Petition

81-1314

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

W. R. GRACE AND COMPANY,
Petitioner,
v.
LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a suit to compel arbitration under a labor contract, may a federal court decide the merits of the dispute and thereby withdraw from the arbitrator the authority that the parties to the labor agreement gave him to decide the dispute?

2. May a federal court rule that a labor arbitration award is invalid because the award does not specifically refer to contract provisions which support the award?

3. May an employer be held liable for back pay to laid off employees when the employer selected those employees for layoff pursuant to the mandate of an EEOC conciliation agreement and a federal district court order?

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LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. R. Grace and Company ("Grace" or "the Company")[1] petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (A. 1a)[2] is reported at 652 F.2d 1248. The oral, bench decision of the United States District Court for the Northern District

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[1] The listing of identifiable legal entities related to W. R. Grace and Company (see Supreme Court Rule 28.1) is set forth in Grace's Application for Extension of Time in Which to File Petition for Certiorari, which was filed with the Court on December 14, 1981.

[2] References to "A.——" are to the Appendix to this petition.

of Mississippi (A. 22a) which was reversed by the Fifth Circuit is not officially reported, but it is unofficially reported at 23 FEP Cases 852.

JURISDICTION

The judgment of the court of appeals (A. 35a) was entered on August 10, 1981, and Grace's Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the court of appeals on September 28, 1981 (A. 37a). Grace's Application for an Extension of Time until January 14, 1982 was granted by Justice White on December 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The purpose and Congressional intent underlying Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), are involved in this case, but no specific statutory provisions are controlling.

STATEMENT OF THE CASE

In 1974, the Equal Employment Opportunity Commission ("EEOC") determined that Grace had engaged in past sex discrimination in employment and that the seniority provisions of its collective bargaining contract with Local 759 [3] were unlawful because they perpetuated the effects of the prior discrimination. As a consequence, the EEOC required the Company to enter into a conciliation agreement or face court action. The Company entered into a conciliation agreement which provided, *inter alia*, that if employee layoffs became necessary, such layoffs would be made in accordance with the layoff procedure prescribed in the conciliation agreement rather

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[3] Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, herein referred to as "Local 759" or "the Union."

than in accordance with the unlawful seniority provisions in the Company's collective bargaining agreement with Local 759.[4] Local 759 was invited to join in the conciliation agreement, but it declined to do so.

When employee layoffs thereafter became necessary, the Union objected to the Company giving effect to the procedures of the conciliation agreement rather than the contractual seniority provisions and sought arbitration. The Company filed a suit against the Union and the EEOC in federal district court seeking to enjoin the arbitration of grievances where the relief sought in arbitration would conflict with the conciliation agreement. The EEOC counterclaimed and crossclaimed for a determination that the contractual seniority provisions violated Title VII or for a determination that the conciliation agreement should be enforced. Local 759 counterclaimed for an order requiring the Company to arbitrate grievances relating to layoffs under the conciliation agreement procedures.

After initiating suit, the Company assumed a passive role in the litigation and the case was decided on the basis of the Union's and the EEOC's cross-motions for summary judgment regarding the legality of the contractual seniority provisions. In November 1975, the district court rendered a decision (*Southbridge Plastics Div., W. R. Grace & Co. v. Local 759 and EEOC*, 403 F. Supp. 1183) holding that the contractual seniority provisions were unlawful and that the modifications of those provisions reflected in the conciliation agreement were necessary to effectuate the goals of Title VII. Accordingly, it issued an order (A. 39a) providing that the terms of the conciliation agreement were binding on all parties to the action and enjoining the parties to abide

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[4] The layoff procedure in the conciliation agreement prescribed a modified application of employee seniority to ensure that females would not be disproportionately affected by a layoff.

by the terms of the conciliation agreement where those terms conflicted with the contractual seniority provisions.

Local 759 appealed the district court's decision to the Fifth Circuit, but it did not seek a stay of the order requiring all parties to abide by the layoff provisions of the conciliation agreement. Accordingly, during the pendency of the appeal, the Company followed the mandated conciliation agreement procedures in making employee layoffs. In early 1978, following this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Fifth Circuit reversed the district court and ruled that the contractual seniority provisions were lawful. *Southbridge Plastics Division v. Local 759 and EEOC*, 565 F.2d 913 (5th Cir. 1978). Accordingly, it granted Local 759's counterclaim seeking arbitration by stating (565 F.2d at 917): ". . . we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions. . . ."

When the Fifth Circuit ruled in 1978 that the contractual seniority provisions were lawful, the Company immediately reinstated all senior male employees who would have retained their positions under the contractual seniority provisions but who, as mandated by the district court, had been laid off pursuant to the provisions of the conciliation agreement. The Union, on the other hand, sought arbitration to determine whether the Company had violated the labor contract and thus owed back pay to the employees adversely affected by the Company's earlier application of the conciliation agreement layoff procedures. That arbitration was presented to Anthony J. Sabella in August 1978. Arbitrator Sabella denied the underlying grievance, stating (A. 43a):

> Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There

> is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances.

Despite the fact that the Sabella arbitration had resolved the issue of the Company's liability for following the conciliation agreement and that the award was final and binding on the Union so as to prohibit it from re-arbitrating the same issue,[5] Local 759 insisted that other "conciliation grievances" presented different issues and should proceed to arbitration before Gerald A. Barrett. Arbitrator Barrett rejected the Union's contention that the grievances before him presented issues different from those decided by Arbitrator Sabella (A. 47a). Nevertheless, he refused to follow the Sabella award because, according to Mr. Barrett, Arbitrator Sabella had exceeded his jurisdiction and authority by basing his award upon equity (A. 50a-52a). And, contrary to Arbitrator Sabella, Mr. Barrett found that the Company was liable for having laid off employees in accordance with the conciliation agreement and the district court order rather than in accordance with the contractual seniority provisions (A. 52a).

The Company then commenced the present suit in the United States District Court for the Northern District of Mississippi[6] to set aside Arbitrator Barrett's award on two basic grounds. First, the Barrett award could

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[5] Both the Union and the Company agree that, under their collective bargaining contract, the decision of an arbitrator adjudicated within his jurisdiction and authority bars re-arbitration of the same issue before another arbitrator.

[6] The district court had jurisdiction under Section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 185), and under Section 10 of the United States Arbitration Act (9 U.S.C. § 10).

not be enforced because the Sabella award was clearly valid under all existing precedent and the parties agreed that under their collective bargaining contract a valid Sabella award would mean the Barrett award must be vacated.[7] Second, even in the absence of the Sabella award, the Barrett award could not be enforced because to do so would penalize the Company for complying with the district court order and doing exactly what the EEOC, an agency of the federal government, had required. The district court agreed, holding that the Sabella award was valid and that it would be contrary to the law and public policy to penalize the Company for abiding by the district court order (A. 29a-32a). Accordingly, the district court vacated the Barrett arbitration award.

The Fifth Circuit reversed. Given the parties' agreement that if the Sabella award was valid the Barrett award must be vacated, the appellate court recognized that the validity of the Sabella award was a controlling issue. It concluded, however, that it would not enforce the Sabella award for two reasons. First, the court found that its 1978 ruling on the Union's motion to compel arbitration had conclusively determined that the Company had breached the collective bargaining contract and that Arbitrator Sabella had no authority to decide otherwise. Thus, the Fifth Circuit stated (652 F.2d at 1257; A. 16a-17a) that in the 1978 decision the court

> withdrew from the authority of the arbitrator any right to decide that the employer had not breached the contract and, therefore, was not liable to the employees for having followed the conciliation agreement. It was determined by the specific holding that the employer had breached the contract. Our inter-

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[7] Given the parties' agreement that the collective bargaining contract precludes re-arbitration of issues previously decided in a valid arbitral award, this case does not present the question of whether one arbitration award generally precludes a contrary award in a subsequent arbitration of the same issue.

> pretation of the contract is res judicata and is binding. Arbitrator Sabella's decision is directly contrary to our holding. He specifically found no breach. This Court's binding decision left as the only issues before the arbitrator which employees had been victims of the breach and damages for the breach. Our holding meant the arbitrator was no longer free to decide whether the employer should be liable for a breach or not.

Second, despite the fact that the Sabella award was consistent with and supported by certain specific terms of the collective bargaining agreement,[8] the appellate court held that the award was invalid because the arbitrator had "departed from the terms of the collective bargaining agreement" (652 F.2d at 1255; A. 11a). Thus, the court stated that "Arbitrator Sabella did not even refer to the collective bargaining agreement in his award but referred only to the fact that 'it would be inequitable and manifestly unfair' to hold against the employer" (*id.*). Further, the court found that the "illegality clause" of the contract did "not necessarily make the Sabella award valid because the Sabella award was not based upon the contract as it applies in the light of the law, but was based solely upon equitable principles and fairness" (652 F.2d at 1255; A. 12a).

With respect to the other issue that would require vacating the Barrett award—i.e., whether Grace could be penalized for obeying the district court injunction—the appellate court concluded that liability could be imposed because Grace had no obligation to obey the 1975

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[8] The "illegality clause" of the parties' contract, Article XIV, Section 7, which clearly supported the Sabella award (see n. 15, *infra*, and accompanying text), provided:

> In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

district court order during the pendency of the earlier appeal inasmuch as the order was later reversed by the Fifth Circuit (652 F.2d at 1258, 1259; A. 18a, 19a).

The conclusions of the Fifth Circuit and the grounds underlying those conclusions are at odds with the applicable decisions of this Court and in conflict with the law of other circuits. For the reasons discussed below, we respectfully submit that this Court should grant the instant petition and review and reverse the decision of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Holding That Its Earlier Decision Foreclosed Arbitrator Sabella From Deciding The Contract Dispute Is Contrary To The Decisions Of This Court And All Other Courts of Appeals

It is uncontroverted that the parties' collective bargaining agreement provided that disputes involving alleged violations of the agreement were to be referred to and decided by an arbitrator. Nevertheless, the Fifth Circuit in the instant case held that its 1978 ruling on the Union's counterclaim seeking to compel arbitration conclusively determined the question of contract violation and hence withdrew that issue from Arbitrator Sabella.[9]

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[9] The parties affected by the 1978 decision had no idea that the Fifth Circuit's cryptic statement, ". . . we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach . . . of the seniority provisions . . ." (565 F.2d at 917), was intended to withdraw from arbitration all issues except damages. Indeed, that case essentially dealt only with the legality of the contractual seniority provisions under Title VII. The court never discussed any contract provisions except the seniority clause and it did not deal with the merits of any breach of contract claims or defenses. Moreover, the Union did not argue in either subsequent arbitration that the arbitrator was restricted to deciding who was to receive how much back pay. Both arbitrators were presented with and dealt only with the question of whether there had been a contract breach, not with

In so holding, the appellate court acted contrary to the law of this Court and the established precedent of every circuit court in the United States federal judicial system.

The decisions of this Court could hardly be clearer or more emphatic on the question of courts' authority to decide questions of labor contract violations in suits to compel arbitration or to review arbitration awards. Thus, this Court has stated that courts have no business deciding the merits of a labor arbitration claim (*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960)), because it is the arbitrator's decision for which the parties to a labor agreement have bargained (*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). Whether a labor agreement has been violated "is a question for the arbitrator, not for the courts" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960)).[10] Every other circuit court

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the amount of back pay. Thus, at the very least, following the Fifth Circuit's order to arbitrate, the parties understood their dispute to be whether the labor agreement had been breached, and reviewing courts should be bound by that understanding. *Piggly Wiggly Operators' Whse., Inc. v. Piggly Wiggly Operators' Whse. Indep. Truck Drivers Local 1*, 611 F.2d 580, 583 (5th Cir. 1980).

Even assuming *arguendo* that the Fifth Circuit panel that ordered arbitration did, in fact, determine the question of contract violation, the Company's instant petition is properly before this Court at this time. *Greer v. Spock*, 424 U.S. 828 (1976); *Reese v. Georgia*, 350 U.S. 85, 87 (1955). *Compare Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 511-512 (1975) *with Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

[10] Indeed, this Court has held that courts may not even render a preliminary nonbinding opinion on the merits of a labor grievance. In *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), this Court held that federal courts may not enjoin a union's sympathy strike pending arbitration of whether that strike violates the union's no-strike pledge in its labor contract. The Court reasoned that to allow courts to decide preliminarily whether the no-strike clause had been violated would result in courts

in the country agrees.[11]

The Fifth Circuit's infidelity to this Court's decisions is manifest in its opinion. Thus, the appellate court speaks of its earlier "interpretation of the contract," of that interpretation being "res judicata and . . . binding" on Arbitration Sabella, and of its "withdr[awing] from the arbitrator the authority" to determine whether the contract had been breached (652 F.2d at 1257; A.

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determining the issues the parties had agreed should be decided by an arbitrator. This Court reaffirmed its position that courts may not decide the merits of an arbitrable dispute by stating: "The parties have agreed to submit to grievance procedures and arbitrate, not to litigate. They have not contracted for a judicial review of the facts and the law." 428 U.S. at 411.

[11] *Blake Construction Co. v. Laborers' Int'l Union*, 511 F.2d 324, 327 (D.C. Cir. 1975); *Warren Brothers Co. v. Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973); *Bressette v. International Talc Co.*, 527 F.2d 211, 214 (2d Cir. 1975); *United Optical Workers Local 408 v. Sterling Optical Co.*, 500 F.2d 220, 224 (2d Cir. 1974); *H. Prang Trucking Co. v. Local 469, Int'l Bhd. of Teamsters*, 613 F.2d 1235, 1237 (3d Cir. 1980); *International Bhd. of Teamsters Local 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 1342 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); *Smith v. Union Carbide Corp.*, 350 F.2d 258, 261 (6th Cir. 1965); *National R.R. Passenger Corp. v. Chesapeake & O. Ry.*, 511 F.2d 136, 140 (7th Cir. 1977); *Western Iowa Pork Co. v. National Bhd. of Packinghouse & Dairy Workers Local 52*, 366 F.2d 275, 278 (8th Cir. 1966); *Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F.2d 496, 499-500 (9th Cir. 1976); *Oil, Chemical & Atomic Workers Local 2-124 v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976).

Prior to its decision in this case, the Fifth Circuit itself has stated in *Gulf Oil Corp. v. International Union of Operating Engineers*, 279 F.2d 533, 535 (1960):

> The merits of a suit to compel arbitration, of course, do not include the determination (1) of the underlying facts and (2) what the ultimate outcome of the controversy will be. These, if the matter is arbitrable, are for the determination of the arbitrator.

See also, *e.g.*, *Piggly Wiggly Operators, Inc. v. Piggly Wiggly Whse. Indep. Truck Drivers Local 1, supra*; *Oil, Chemical & Atomic Workers Local 41600 v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981).

16a-17a).[12] In sum, the Fifth Circuit's decision represents a radical departure from established Supreme Court precedent, it is in conflict with the established law of all other circuit courts of appeals, and, accordingly, review by this Court is warranted.[13] It is respectfully submitted that the decision is so clearly erroneous and so clearly at odds with established legal principles that this Court may reverse simply on this petition and any response thereto without the need for further briefing and argument. *E.g., Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800 (1976).[14]

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[12] The Fifth Circuit supported its departure from established principles of labor arbitration law by analogizing its action in this case to the situation in which a circuit decides an issue earlier presented to a district court and remands the remainder of the case to that district court for further proceedings. (See 652 F.2d at 1257; A. 15a-16a.) Thus, the court found the instant case to be controlled by *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), in which the court, on appeal, had decided an issue and thereby withdrew it from consideration by a district court on remand. The analogy is inapplicable. Of course a circuit court can decide issues for the district courts, but that does not mean it can decide them for arbitrators. See nn. 10 and 11, *supra*, and accompanying text.

[13] A review on writ of certiorari may be granted where ". . . a federal court of appeals . . . has decided a federal question . . . in conflict with applicable decisions of this Court." U.S. Sup. Ct. R. 17(1)(c). *E.g., Egan v. Aurora, Ill.*, 365 U.S. 514 (1961), *on remand*, 291 F.2d 706 (7th Cir. 1961); *Wilson v. Schnettler*, 365 U.S. 381 (1961), *rehearing denied*, 365 U.S. 890 (1961).

Review on writ of certiorari may also be granted where ". . . a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . ." U.S. Sup. Ct. R. 17(1)(a). *E.g., United States v. O'Malley*, 383 U.S. 627 (1966); *United States v. Muniz*, 374 U.S. 150 (1963).

[14] In *Prairie Construction* this Court held that the District of Columbia Circuit had clearly erred in deciding a collective bargaining unit issue which should have been first considered by the Na-

2. The Sabella Award Is Supported By The Provisions Of The Collective Bargaining Agreement, And The Fifth Circuit's Conclusion That The Award Is Invalid Because Arbitrator Sabella Did Not Refer To Those Provisions Is In Conflict With The Decisions Of This Court And Other Courts Of Appeals

The "illegality clause" of the collective bargaining contract before Arbitrator Sabella for interpretation and application provided that a provision of the contract found to be in conflict with any law shall be superseded by such law. (See n. 8, *supra*.) In determining that the Company was not liable for failing to apply the contractual seniority provisions that the EEOC and district court had found to violate Title VII, Arbitrator Sabella found that the Company "was acting in concurrence with the District Court's order, as it was required to do," that the Company "could not anticipate nor was it required to anticipate the Circuit's reversal," and that "[i]t would be inequitable and manifestly unfair to penalize the [Company] under these circumstances" (A. 43a). Although Arbitrator Sabella's interpretation of the parties' agreement is clearly supported by the illegality clause,[15]

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tional Labor Relations Board. Accordingly, it reversed the circuit's decision based upon a review of the petition for certiorari without ordering further briefs and argument. Similarly, in the present case the Fifth Circuit has clearly erred in deciding the merits of a labor contract dispute that it had no authority to decide, and this Court should likewise reverse based upon the instant petition.

[15] The illegality clause, of course, can be read to excuse nonperformance of a contractual obligation during the pendency of an outstanding determination that performance would be illegal, even though it is later determined that performance would not, in fact, be "in conflict with any law." Under this interpretation, the EEOC's and district court's determinations that the contractual seniority provisions were illegal would have relieved Grace of any obligation to apply those provisions until such time as a higher authority determined that their application would not violate the law. Although Arbitrator Sabella did not specifically elucidate this application of the illegality clause, his finding that Grace was acting in accordance

the Fifth Circuit found that the Sabella award was invalid because it "was not based upon the contract as it applies in light of the law, but was based solely upon equitable principles and fairness" (652 F.2d at 1255; A. 12a). The appellate court found "[t]his conclusion . . . inescapable since Arbitrator Sabella did not even refer to the collective bargaining agreement in his award. . ." 652 F.2d at 1255; A. 11a).[16]

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with the district court order and was not required to anticipate the circuit's reversal is consistent with this rationale and certainly supported by the clause.

Sabella's award may also be interpreted as a finding that the Company breached the agreement but that, in circumstances where the Company was adhering to a district court injunction, back pay would not be awarded. As the labor agreement did not mandate a back pay award, Sabella would have been simply exercising his judgment and discretion in framing a fair and equitable remedy to which a court must defer. *United Steelworkers v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597 ("When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."). See also *International Ass'n of Mach. Dist. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir.), *cert. denied*, 396 U.S. 820 (1969).

[16] To the extent that the Fifth Circuit's discussion of "The Law of the Contract" (652 F.2d at 1255-1257; A. 11a-15a) can be read to imply that the illegality clause could not relieve the Company of its obligation to follow the contractual seniority provisions, the court is wrong on at least two counts.

First, although the court may be right that judicial decisions in general (and its 1978 decision in particular) merely declare the law as it has always existed, the question in the instant case was not what the "true" law of the land was during the term of the parties' labor contract. Rather, the issue was: what was the contractual agreement of the parties? Clearly, Arbitrator Sabella would have been operating within his jurisdiction and authority if he had simply stated that during the pendency of administrative and judicial determinations of illegality, the illegality clause had relieved the Company of any obligation to apply the seniority pro-

Thus, the Fifth Circuit's decision stands for the proposition that a labor arbitration award, even though supported by the terms of the contract, is invalid when the award does not refer to a specific contractual provision which supports the award. As such, the decision is clearly in conflict with this Court's holding that a labor arbitrator's award will not be denied enforcement simply because the arbitrator's written opinion may be ambiguous or may not mention any specific contractual provisions. *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 597-598. Simply stated, this

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visions and that this resulted not because the provisions were in fact illegal under the "true" law but because the parties had intended the illegality clause to operate during the pendency of even erroneous determinations of illegality. Thus, the Fifth Circuit's suggestion that the "true" law must control is simply a substitution of its interpretation of the contract for that of Arbitrator Sabella, a result clearly not permitted under this Court's decisions. (See nn. 10 and 11, *supra*, and accompanying text.)

Second, the Fifth Circuit simply dealt with the wrong analogies when it discussed the fact that a party is liable for damages when it rescinds a contract, acts in violation of the antitrust laws, or violates the secondary boycott prohibitions of the National Labor Relations Act even though the party has a good faith but mistaken belief that it is operating in accordance with the law of the land (652 F.2d at 1255-1256; A. 12a-13a). For in this case, the Company was not acting unilaterally, but was acting pursuant to an injunction order of the district court. Thus, a relevant analogy in the case of a secondary boycotting union is posed by the following question: When a union has been ordered to cease and desist its secondary boycott activity, would a court hold that union liable for damages in a suit by employees who claim that the union's failure to vigorously pursue its secondary pressure denied them (the employees) full, fair and adequate representation? Or would a court find that federal employees have acted improperly by not releasing data pursuant to a Freedom of Information Act request when those employees had been enjoined by another court from releasing the data? In both examples, we submit, the answer is, "Of course not," even if those cease and desist and injunction orders were later reversed on appeal. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980).

Court has ruled that a labor arbitrator's award must be enforced if it draws its essence from the labor contract, even though the arbitrator's reasoning may be wrong or ambiguous, even though he may give no reason at all, and even though the court itself has to look through the agreement and develop its own rationale for sustaining the arbitrator.[17]

Until now, eight circuit courts have agreed that a labor arbitrator's award will be enforced as long as it is possible for the reviewing court to find a rational basis for the award in the terms of the labor agreement.[18]

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[17] In *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969), the Third Circuit explained this Court's ruling as follows:

> [A] labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by the principles of contract construction and the law of the shop, may a reviewing court disturb the award.

Applying that standard, the Third Circuit enforced an arbitration award which on its face seemed to be at odds with the provisions of the labor contract. Although the arbitrator had not explained his reasoning, the court set forth two lines of reasoning which the arbitrator "could have" employed to reach his conclusion and, based upon these court-supplied reasons, enforced the award. 405 F.2d at 1132. See also *NF&W Corp. v. United Steelworkers*, 524 F.2d 756, 760 (3d Cir. 1975), where the Third Circuit again supplied the rationale that the arbitrator "might have" or "could have" used, and enforced the award.

[18] *Victor Elec. Wire & Cable Corp. v. IBEW*, 411 F. Supp. 338, 341-343 (D.R.I. 1976), *aff'd without published opinion*, 546 F.2d 413 (1st Cir. 1976) (award must be enforced unless it is impossible to reconcile with contract); *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 703-704 (2d Cir. 1978) (award must be upheld if there is "barely colorable justification" for decision); *Ludwig Honold, supra*, 405 F.2d at 1128 (award draws essence from contract if the interpretation can in "any rational way

The Fifth Circuit's deviation from settled law in this case puts it at odds with the law of this Court and those other circuits. The court's decision thus merits not only review by this Court but reversal based upon this peti-

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be derived from the agreement"); *Crigger v. Allied Chemical Corp.*, 367 F. Supp. 1133, 1139 (S.D. W. Va. 1973), *aff'd*, 500 F.2d 1218 (4th Cir. 1974) (award draws essence from contract if a rational basis for award can be derived from agreement); *Detroit Coil v. International Ass'n of Machinists & Aerospace Workers Lodge 82*, 594 F.2d 575, 579 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) (award must be enforced if it is derived in any rational way from the agreement or supported by any language in contract); *Kroger Co. v. International Bhd. of Teamsters Local 661*, 380 F.2d 728, 730-732 (6th Cir. 1967) (award upheld where supported by the "four corners" of the contract); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Local 7-1*, 548 F.2d 1288, 1294 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977) (award upheld if rational basis can be derived from language in contract); *Kewanee Machinery Div. v. Local 21, Int'l Bhd. of Teamsters*, 593 F.2d 314, 318 (8th Cir. 1979) (award must stand unless it can be said "with positive assurance that the contract is not susceptible [to] the arbitrator's interpretation"); *Douglas Aircraft Co. v. N.L.R.B.*, 609 F.2d 352, 355 (9th Cir. 1979) (ambiguous award must be interpreted in nonrepugnant manner to reach plausible basis for decision); *United Steelworkers v. Amax Aluminum Mill Products, Inc.*, 451 F.2d 740, 742-743 (9th Cir. 1971) (if award represents plausible interpretation of contract, judicial inquiry ceases and the award must be enforced); *IBEW v. Professional Hole Drilling, Inc.*, 574 F.2d 497 (10th Cir. 1978) (award enforced if contract language susceptible to arbitrator's interpretation).

Indeed, prior to the instant case, the Fifth Circuit had professed to follow these established legal principles. See, *e.g.*, *International Union of Dist. 50 v. Bowman Transp., Inc.*, 421 F.2d 934 (5th Cir. 1970) (citing *Ludwig Honold, supra*, with approval); *International Bhd. of Teamsters Local 745 v. Braswell Motor Freight Lines*, 392 F.2d 1 (5th Cir. 1968), *cert. denied*, 401 U.S. 937 (1971); *Dallas Typographical Union No. 173 v. A. H. Belo Corp.*, 372 F.2d 577, 581 (5th Cir. 1967) (enforcing an arbitration award where there was "an arguable basis" for the award); *International Bhd. of Pulp Workers Local 874 v. St. Regis Paper Co.*, 362 F.2d 711 (5th Cir. 1966); *Dean Truck Line, Inc. v. Local 667, Int'l Bhd. of Teamsters*, 327 F. Supp. 1335, 1341 (N.D. Miss. 1971).

tion alone, without the need for additional briefs and argument. (See n. 14, *supra*, and accompanying text.)

3. In Finding The Company Liable For Compliance With The District Court's Injunction Enforcing The EEOC Conciliation Agreement, The Fifth Circuit's Decision Disregarded Legal Principles Established By This Court And Conflicted With Decisions Of Other Circuits

As previously mentioned, the Fifth Circuit reversed the district court's decision that a second, independent ground existed for vacating the Barrett arbitration award.[19] Thus, the appellate court held Grace liable for thousands of hours of back pay despite the fact that the Company did exactly what the EEOC had required and a federal district court had ordered it to do.[20] As we show below,

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[19] If this Court agrees that the Fifth Circuit should be reversed on its holding that the Sabella award was invalid and unenforceable, the parties' agreement on the effect of a valid Sabella award (see n. 5, *supra*) requires that the Barrett award be vacated, and this Court need not deal with this last issue presented by the instant petition.

[20] It is true, of course, that the Fifth Circuit found the Company liable in the context of enforcing a labor arbitration award, but that is no different from the court coming to its own conclusion on this issue. Thus, when a court is confronted with the contention that an arbitrator's award cannot be enforced because it contravenes law and public policy the court itself must determine *de novo* whether the award contravenes law and policy. *Communications Workers v. Mountain States T. & T Co.*, —— F.2d ——, 102 LRRM 2161, 2165 (10th Cir. 1978); *Telephone Wkrs Union v. New Jersey Bell*, 450 F. Supp. 284, 296 (D.N.J. 1977), *aff'd*, 584 F.2d 31 (3d Cir. 1978). In such a case the court is not concerned with the normal deference paid to labor arbitrators or whether the arbitrator's decision draws its essence from the contract—that is assumed. This issue is whether the court (not the arbitrator) believes that an otherwise valid award may be lawfully enforced or whether the law or public policy precludes enforcement. For example, in *Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963), the court stated:

> It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the 'power of

the Fifth Circuit decision on this issue is in conflict with established and important legal principles which are imperative for an orderly administration of the law and is in conflict with a decision of the Ninth Circuit on similar issues.

As pointed out earlier, Grace was required by the EEOC to enter into a conciliation agreement modifying the application of what the Agency had found to be unlawful contractual seniority provisions. When the Union objected, the Company turned to the federal courts for a determination of its paramount legal obligation—*i.e.*, whether it should apply the contractual seniority provi-

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> the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States * * *". *Hurd v. Hodge*, 344 U.S. 24, 34-35 . . . (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts . . . are empowered to fashion.

See also *Communications Workers v. Mountain States T & T Co., supra*; *General Warehousemen and Helpers Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1291-1293 (5th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979); *Banyard v. N.L.R.B.*, 505 F.2d 342, 347 (D.C. Cir. 1974); *Gulf States Telephone Co. v. Local 1692, IBEW*, 416 F.2d 198, 201 (5th Cir. 1969); *Southern Conference of Teamsters Local 568 v. Red Ball Motor Freight, Inc.*, 374 F.2d 932 (5th Cir. 1967); *International Bhd. of Teamsters Local 249 v. Consolidated Freightways*, 464 F. Supp. 346 (W.D. Pa. 1979); *Local 1115, Nursing Home, Hosp., Senior Cit. Hotel Union v. Hialeah Convalescent Home, Inc.*, 348 F. Supp. 405 (S.D. Fla. 1972); *Board of Trustees v. AFT Local 1942*, 103 LRRM 2597 (Conn. Sup. Ct. 1979); *Cook County Bd. of Trustees v. Local 1600*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); *Goodyear Tire & Rubber Co. v. Sanford*, 540 S.W.2d 478, 92 LRRM 3492 (Tex. Civ. App. 1976).

Moreover, the usual considerations mandating deference to arbitration decisions would not apply to the Barrett award in any event. As we have shown in Sections 1 and 2, *supra*, the Barrett award in essence overruled a valid and binding award by Arbitrator Sabella. Hence, in the unique facts of this case, the public policy usually furthered by deference to arbitral awards—the finality of awards and the consequent stability and enhancement of the arbitral process—would actually be undermined by enforcement of the Barrett award.

sions or the layoff procedure which the EEOC found necessary to remedy the Title VII violation. The Company got its answer—in 1975 the district court held that the contractual provisions were unlawful and enjoined the Company and the Union to apply the conciliation agreement procedures in making employee layoffs. The Company obeyed that injunction and made employee layoffs in accordance with the conciliation agreement until the district court's order was vacated in 1978.

In reversing the district court's present determination that the Company was not liable for following the conciliation agreement procedure mandated by the earlier district court injunction, the Fifth Circuit held that Grace had no obligation to obey the injunction in 1975-1977 because it was eventually reversed on appeal in 1978. Thus, the appellate court stated (652 F.2d at 1258, 1259; A. 18a, 19a):

> The conclusion reached immediately above [regarding the fact that the earlier Fifth Circuit decision had reversed the district court and had announced the law as it had always existed] settles the contention of the Company that the district judge in the original *Southbridge Plastics* case had issued an order which was binding on the Company to apply the conciliation agreement rather than the seniority provision of the collective bargaining agreement.
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> * * *
>
> [T]his Court's decision reversing the district court in *Southbridge Plastics* in terms forecloses as well the assertion of an obligation to obey the district court order.

With all due respect to the Fifth Circuit, this holding is plainly wrong. As this Court has made abundantly and emphatically clear, court orders must be obeyed until, *not unless*, reversed on appeal[21]:

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[21] There was neither a contention by the Union nor a suggestion by the Fifth Circuit that the district court lacked jurisdiction over the subject matter or the persons in the 1974 district court proceeding.

> [A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. . . .
>
> "An injunction duly issuing . . . must be obeyed by [the parties] however erroneous the action of the court may be. . . . [U]ntil its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

United States v. United Mine Workers of America, 330 U.S. 258, 293-294 (1947), *quoting Howat v. Kansas*, 258 U.S. 181, 189, 190 (1922) [footnotes omitted]. See also *Walker v. City of Birmingham*, 388 U.S. 307, 314, *reh. denied*, 389 U.S. 894 (1967) (disobedience of court orders is punishable as contempt even though the order is later set aside on appeal); *Cliett v. Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962) (same).[22]

The corollary to the principle that one can be punished for violating a court order later determined to be erroneous is the principle that one should not be punished for complying with such an order. This latter principle is reflected in the well-established rule that, absent a bond, there can be no recovery for damages sustained by the wrongful issuance of an injunction unless a suit is brought for malicious prosecution or on a theory of un-

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[22] Just last year, this Court recognized a similar principle in *GTE Sylvania, Inc. v. Consumers Union, supra*, 445 U.S. at 387:

> There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents . . . . To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" . . . .

just enrichment. Thus, in *Russell v. Farley*, 105 U.S. 433, 437 (1882), a case involving an improperly issued injunction, this Court stated that:

> Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just.

And in *United Motors Service v. Tropic-Aire*, 57 F.2d 479, 483 (8th Cir. 1932), the Eighth Circuit summarized the rule as follows:

> The philosophy of the matter is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless the same is sufficiently intentional as to be the basis of a suit for malicious prosecution, otherwise the damage is *damnum absque injuria.*

See also Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167-1168 (9th Cir. 1976), *cert. denied*, 431 U.S. 903 (1977); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 304 n. 6 (5th Cir.), *cert. denied*, 414 U.S. 877 (1973) ("[W]e are 'astonished' at the 'proposition that a court would hold one person liable for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute.'"); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) (individual cannot be punished for actions which are protected by a court order); *Tenth Ward Road Dist. No. 11 v. Texas & P. Ry.*, 12 F.2d 245, 247 (5th Cir. 1926); 2 Moore's Federal Practice ¶ 65.10 at 98-99; 11 Wright & Miller, Federal Practice and Procedure: Civil ¶ 2973 at 652.

As the foregoing authorities show, there is no principle more firmly imbedded in our judicial system, nor

one more vital to the orderly processes of the law, than the sanctity and inviolability of court orders. The reasons for the principle are clear. If one's duty to comply with lower court orders is made to depend upon the eventual affirmation of reviewing courts, then each person subject to a lower court order would find it necessary to take upon himself the responsibility for determining the correctness or incorrectness of the court's decision—in essence, the responsibility to determine "the law." The chaos that would result from such a rule is apparent.

The Fifth Circuit's decision in the instant case does violence to this principle. By requiring the Company to pay damages because it obeyed the earlier district court injunction, the appellate court, in essence, has told W. R. Grace and all other employers that if a court orders them to do something which they or their counsel think may be incorrect, the appropriate course of action is to ignore the court order.

Moreover, the Fifth Circuit's decision also tells employers that they are at risk whenever they conciliate an EEOC finding of employment discrimination. For if the Fifth Circuit is correct, and employers can be held liable for back pay resulting from adherence to the provisions of even a court-enforced EEOC conciliation agreement, few, if any, employers will conciliate cases with the EEOC. This, in turn, will drastically undercut the Congressional policy in favor of voluntary compliance and conciliation of discrimination claims.[23]

Thus, the Fifth Circuit's decision regarding the effect of the conciliation agreement and district court injunction on Grace's liability is contrary to the applicable de-

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[23] See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 48 (1974); *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

cisions of this Court and does violence to important principles and policies which this Court has previously recognized. And the application of these principles and policies especially needs to be re-emphasized or clarified in the field of employment discrimination, because more and more employers are finding themselves in situations similar to Grace where they are being confronted with conflicting obligations. Indeed, as discussed below, the Fifth Circuit's decision in the instant case conflicts with the law in the Ninth Circuit on a similar proposition.

Thus, in *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981), the court affirmed the dismissal of a suit for back pay by non-minority employees who were denied promotions because minority employees were promoted pursuant to an affirmative action program established pursuant to a consent decree. The court stated (548 F.2d at 695):

> Awarding compensatory relief to the non-minority employees would impose conflicting or inconsistent obligations on the . . . [employer]. Each time the . . . [employer] attempted to comply with the affirmative action program by promoting a minority employee, it would have to give an equivalent amount of compensation to a non-minority employee who would have been promoted but for the consent decree. That extra compensation would drastically increase the cost of each promotion and would burden the . . . [employer] for complying with the consent decree.

Moreover, in affirming dismissal of the case, the Ninth Circuit, again in conflict with the Fifth Circuit's decision in this case, relied on the fact that granting damages to adversely affected non-minority employees would drastically undermine the goal of promoting the voluntary con-

ciliation of Title VII claims. Thus, the court stated (658 F.2d at 696):

> [W]e feel that permitting the . . . [plaintiff] to sue for compensation would be inimical to the policy underlying Title VII of promoting settlements. *Cf. Alexander v. Gardener-Denver Corp.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L. Ed. 2d 147 (1974); *United States v. City of Miami*, 614 F.2d 1322, 1331-32 (5th Cir. 1980) (citing cases). The . . . [employer] would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the Dennison class plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees. *Cf. United Steelworkers v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L. Ed. 2d 480 (1979) (Blackman J. concurring); *Weber v. Kaiser Aluminium & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1978) (dissenting opinion).[1]

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[1] We accordingly reject the view of the district court in *McAleer v. American Telephone & Telegraph Co.*, 416 F.Supp. 435 (D.D.C. 1976), that an employee allegedly denied a promotion because his employer was complying with a consent decree is entitled to damages. That court held that denying relief to the employee would unfairly burden him with the consequences of a judicial decree necessitated by the employer's wrongdoing. For reasons stated previously in this opinion, we find the district court's reasoning unpersuasive. See also *Telephone Workers v. New Jersey Bell Telephone Co.*, 450 F.Supp. 284, 298 (D.N.J. 1977), aff'd 584 F.2d 31 (3d Cir. 1978).

As the foregoing case shows, these last issues presented by the instant petition are not unique, and different courts[24] have resolved the issues in different ways.

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[24] Other cases have also resolved similar issues in a manner conflicting with the Fifth Circuit's decision *sub judice*. For example, in *Freeze v. ARO, Inc.*, 503 F. Supp. 1045 (E.D. Tenn. 1980), now under appeal to the Sixth Circuit, the district court held that employer action taken pursuant to a conciliation agreement with the Secretary of Labor under Executive Order 11246 insulated the employer from Title VII claims of reverse discrimination. Further,

Unless this Court summarily reverses the Fifth Circuit, or at least addresses these last issues presented, employers, employees and government agencies alike will be unable to determine how they are to proceed in remedying either real or apparent equal employment opportunity problems. We respectfully submit that this Court should grant certiorari for the purpose of resolving the conflicting law of the circuit courts (U.S. Sup. Ct. R. 17(1)(a)) and for the purpose of clarifying an employer's paramount obligation when confronted with conflicting demands of federal agencies, courts and collective bargaining agents. In so doing, this Court should reverse the Fifth Circuit in order to ensure support of the important policy demanding obedience to court orders, to enhance voluntary conciliation of employment discrimination claims, and to relieve employers, employees and government agencies of needless and expensive litigation. See, *e.g.*, U.S. Sup. Ct. R. 17(1)(c); *United States v. An Article of*

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the court held that the employer did not have to arbitrate grievances filed by white employees adversely affected by application of the conciliation agreement.

The facts in *Local 223, Utility Workers Union of America v. The Detroit Edison Co.*, Case No. 81-70694 (E.D. Mich., So. Div. 1981), are even closer to those in the instant case. In the Michigan case, the union sought to compel the arbitration of grievances arising from actions taken by Detroit Edison in compliance with a court order mandating affirmative action which had later been vacated in light of this Court's *Teamsters* decision. In an oral decision rendered on December 11, 1981 (A. 54a-56a), the district court dismissed the union's suit, stating that it would not order Detroit Edison to submit to an arbitration which would cause the company to pay out money for compliance with an enforceable court order. The pertinent facts in the *Detroit Edison* case are virtually indistinguishable from those that were before the Fifth Circuit in the instant case—both cases involved enforceable court orders which were later vacated and unions' attempts to secure damages, through arbitration, for mandated employer actions taken prior to the time the court orders were vacated. We submit that the Michigan court's conflicting decision is correct, and that this Court should grant certiorari to make that clear.

Drug, 394 U.S. 784 (1969), *rehearing denied*, 395 U.S. 954 (1969) (certiorari granted on an important and unique statutory question).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the decision of the Fifth Circuit reversed.

Respectfully submitted,

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DATED: January 14, 1982

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* A Partnership of Professional Associations and Professional Corporations.

CERTIFICATE OF SERVICE

The undersigned certifies that on January 14, 1982, three (3) copies of the foregoing Petition for a Writ of Certiorari were served by first-class mail, postage prepaid, on the following:

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DATED: January 14, 1982

Appendix

APPENDIX

[U.S. COURT OF APPEALS OPINION]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit A

No. 80-3661

W. R. GRACE AND COMPANY,
Plaintiff-Appellee,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Defendant-Appellant.

Aug. 10, 1981

Cupit & Maxey, Danny E. Cupit, Robert W. Sneed, Jackson, Miss. for defendant-appellant.

Ogletree, Deakins, Nash, Smoak, Stewart & Edwards, Peter G. Nash, Dixie L. Atwater, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case involves an appeal from a summary judgment granted by the district court setting aside a labor arbitration award in favor of defendant union and enjoining the union from further pursuing similar claims through the grievance procedure. This simple statement of the immediate issue before the Court, however, rests upon an Equal Employment Opportunity Commission de-

termination of racial and sex discrimination, a conciliation agreement with EEOC, an arbitration award prior to the one here challenged, a prior decision of the district court, and a prior decision of this Court. The scene of the development of this industrial relations imbroglio is the plant of the Southbridge Plastics Division of W. R. Grace & Company, in Corinth, Mississippi. At all times involved in the events of this case, defendant union, Local No. 759 of the International Union of United Rubber, Cork, Linoleum and Plastics Workers of America was the certified bargaining representative at the Corinth plant for the employees involved.

In 1972, two black male employees filed a charge against the company with the Equal Employment Opportunity Commission, claiming that the failure to promote them was with racially discriminatory motive. The EEOC made a thorough investigation of the conditions at the plant. It concluded that there had been racial discrimination as to some employees and remedies were agreed upon. At this point, we drop the issue of racial discrimination entirely from the case.

In its investigation the EEOC also determined that the company had been discriminating against women in its employment practices. Its entire cadre of female employees was clerical, and the EEOC found that there had been discrimination in not giving women opportunity to work in the operating or production phase of the business. As the result of the EEOC investigation, in 1974 the company and the Commission signed a conciliation agreement under which the company agreed to cease its discriminatory practices. A further part of the agreement contained a provision that its terms would override the seniority provisions of the collective bargaining agreement between the parties. The reason underlying this provision of the conciliation agreement, of course, was the conclusion that there having been discrimination in the past, this discrimination would be perpetuated if the company strictly followed contract seniority. Those who

had been discriminated against in the past would have lower job and departmental seniority.

While the union knew that such an agreement was being developed, it did not participate in the negotiations. Nor did it sign the agreement or approve it in any way, although it was given the opportunity to do so.

Shortly after the conciliation agreement was signed and the company began to follow it, the union instituted grievance proceedings to establish the seniority rights of male employees who had been laid off while female employees junior to them had been retained in operator positions. The union having insisted that these grievances go to arbitration, the company brought suit in the United States District Court under § 301(a) Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), seeking to enjoin the union from arbitrating grievances where the relief sought in arbitration would conflict with the terms of the conciliation agreement the company had entered into with the EEOC. The EEOC also counterclaimed and crossclaimed against the company and the union seeking a declaratory judgment that the provisions of the conciliation agreement superseded the seniority provisions of the collective bargaining agreement.

In November 1975, the district court held that the conciliation agreement was binding on the company and the union and superseded any conflicting provisions in the labor agreement. It enjoined the arbitrations requested by the union. It rendered a declaratory judgment that the conciliation agreement was binding on all parties to the action and that the senioriity provisions of the collective bargaining agreement were in conflict with the conciliation agreement. *Southbridge Plastics Division* v. *Local No. 759*, 403 F.Supp. 1183 (M.D. Miss. 1975). The union appealed to this Court.

While the union's appeal was pending, the United States Supreme Court decided *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct.

1843, 52 L.Ed.2d 396 (1977). In that case the government had brought suit claiming the employer and the union were engaging in racial discrimination. The government urged the theory, which the EEOC used in this case, that the seniority system in the collective agreement had to yield to the corrective action necessary to eliminate the effects of discriminatory employment practices. The United States Supreme Court found, however, that the seniority systems involved were "bona fide" and, therefore, were specifically protected by § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court asserted at p. 350 of its opinion that the legislative history is clear: Title VII was to have no effect on "established seniority rights." Its effect was to be "prospective" only. The Court conceded that a seniority system could tend to perpetuate the effects of discrimination. But the Court held, nevertheless, that the statute protects "bona fide" seniority systems so long as they do not fall within the proviso which prohibits differences in treatment of employees which are the result of "an intention to discriminate." The Court specifically held: "[T]he union's conduct in agreeing to and maintaining the [seniority] system did not violate Title VII." p. 356. The Court directed the district court to vacate the injunction against the union.

When the appeal of the union in the principal case came on to be heard before this Court, we reversed the district court's decision, relying at least in part upon the Supreme Court's decision in the *Teamsters* case. *Southbridge Plastics Div.* v. *Local No. 759, Etc.*, 565 F.2d 913 (5th Cir. 1978). We also made reference to *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), which had followed the *Teamsters* case and had held that a discriminatory purpose must be shown before a seniority system can be found not to be bona fide.[1] At p. 916 we said: "[W]hole-

[1] The Court also relied upon *Stevenson v. International Paper Co.*, 516 F.2d 103, 118 (5th Cir. 1975) (holding the power to enjoin

sale destruction of this (seniority) system as authorized by the conciliation agreement cannot be permitted." We concluded by granting the union's counterclaim "seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement." p. 917.

The company, which had been operating in accordance with the district court's order by following the conciliation agreement rather than the seniority provisions of the collective bargaining agreement, immediately changed its policy in response to the decision of this Court. It began again to follow the bargained seniority plan in the contract.

Our holding, as set out above, had directed arbitration of the grievances filed by the union protesting the company following the conciliation agreement over the seniority provisions of the contract. One such case was submitted to arbitrator Anthony J. Sabella. It involved a male operator who had been reduced in grade and later laid off while junior female operators were retained. Arbitrator Sabella held in favor of the company. His entire opinion insofar as it states his reasoning for his award is as follows:

> Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be in-

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application of a seniority system must be limited to the requirements of Title VII), and *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *amended and modified on other grounds*, 556 F.2d 758 (5th Cir. 1977) (elaborating on the need for "circumspection" in replacing contract provisions with Title VII requirements).

equitable and manifestly unfair to penalize the Employer under these circumstances.

The union, however, continued to process grievances involving the same issue. The company went along with the union and submitted some of those grievances to arbitrator Gerald A. Barrett, asserting its claim that the Sabella award involving the same issue was controlling. Arbitrator Barrett upheld the union's grievances. The company then brought this suit to set aside the Barrett award and enjoin pursuit of further similar grievances. § 301 LMRA, 29 U.S.C. § 185(a).

We reverse the district court and render summary judgment for defendant union enforcing the Barrett arbitration award.

THE POWER OF THE SECOND ARBITRATOR

The precise issue before this Court is whether the second arbitration involving the same factual situation, the Barrett award, should be set aside as invalid. This question, however, turns in large measure on whether the earlier Sabella award which yielded a contrary result was itself valid. In general, it is established that an arbitrator will follow a prior award on controlling facts under the same contract. *Local 103, Int'l U. of Electrical, Radio and Machine Workers, AFL-CIO* v. *RCA Corp.*, 516 F.2d 1336 (3rd Cir. 1975); *Westinghouse Electric*, 45 L.A. 899 (1965); *Sears, Roebuck & Co., Inc.*, 39 L.A. 567 (1962). *But compare Westinghouse Elev[illegible] of Puerto Rico* v. *SIU de Puerto Rico*, 583 F.2d 1184 (1st Cir. 1978), reviewing a second arbitration award on the established narrow grounds without regard to the fact that it was contrary to a prior award between the same parties.

Arbitrator Barrett in his award recognized this principle. But it is also established that if an award exceeds the arbitrator's jurisdiction or authority, does not draw

its essence from the collective agreement, it cannot be considered to be binding. *Torrington* v. *Metal Products Workers*, 362 F.2d 677 (2nd Cir. 1966) (setting aside such an award). *See also Amalgamated Meat Cutters and Butcher Workmen of North America, Dist. Local No. 540* v. *Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973), recognizing the principle but in the particular case upholding the award. In *San Antonio Newspaper Guild, Local No. 25* v. *San Antonio Light Div.*, 481 F.2d 821 (5th Cir. 1973), this Court granted enforcement of a second arbitrator's award when the first award was imperfect and inconclusive.

The awards of arbitrators go further. There is a substantial body of jurisprudence reflected in arbitration awards which holds that the second arbitrator need not follow the earlier arbitration if it is found to be "plainly erroneous." For a discussion of this principle see arbitrator Goldberg's opinion in *Mallinckrodt Chemical Works*, 50 L.A. 933, 935 (1968). For other similar arbitration awards see *Carbon Fuel Co.*, 67 L.A. 1038 (1976); *American Smelting & Refining Co.*, 59 L.A. 340 (1972); *Coleman Co., Inc.*, 52 L.A. 357 (1969); *American Cyanimid Co.*, 49 L.A. 314 (1967); *American Steel Foundries*, 19 L.A. 779 (1952).[2]

The contract involved in this case contains what is a typical, but not always included, "finality" clause. Article IV, Section 4, reads:

> . . . The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final

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[2] For an even more extreme statement see arbitrator Justin's opinion in *Federal Bearings Co., Inc.*, 22 L.A. 721, 725-6 (1954), "The arbitrator may consider prior awards between the parties . . . but he is not bound to follow them." "As long as the arbitrator keeps within his jurisdiction, he can decide the issues submitted to him, notwithstanding any prior awards between the parties, unless the parties have agreed otherwise."

and binding on the aggrieved employee or employees, the Union and the Company.

The existence of this clause in the contract was also relied upon by arbitrator Barrett in taking the view that an award which is within the jurisdiction and authority of the arbitrator should be considered binding in the subsequent arbitration. The role of a finality clause is stressed in the case of *Local 616, Int'l U. of Electrical Radio and Machine Workers, AFL-CIO* v. *Byrd Plastics, Inc.*, 428 F.2d 23, 26 (3rd Cir. 1970) (a finality clause gives "something similar to res judicata" in the context of labor arbitrations).

It is not necessary in this case to make an authoritative decision as to the extent to which a prior arbitration award should be considered binding upon a subsequent arbitrator when the issue involves the same facts and the same contract provision. We assume that such a prior award is binding, as arbitrator Barrett did assume, if it is within the "jurisdiction and authority" of the arbitrator who makes the award. But there is also no dispute in the law that if the decision of the arbitrator is not "within his jurisdiction and authority" it is invalid. Resolution of the issue raised by the words "jurisdiction and authority" will answer the question of whether the Barrett award can stand in view of the earlier Sabella award.

It is from the third case of the well-known "trilogy" of Supreme Court cases in labor arbitration [3] that we find the origin of the decisive and unwavering authority on this issue. The case is *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4

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[3] The trilogy consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), and *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), plus the *Enterprise Wheel & Car* case cited and discussed above.

L.Ed.2d 1424 (1960). In contrast to the other two cases of the trilogy, *Enterprise Wheel & Car* involved a suit to enforce an arbitration award rather than a suit to force a recalcitrant party to carry out its promise to arbitrate. The issue in *Enterprise Wheel & Car* was whether the arbitrator had exceeded his jurisdiction in awarding back pay. The Court found that a portion of the arbitrator's award was unclear as to whether or not he had exceeded his jurisdiction. In the following statement, the Court clearly outlined the law which must control the evaluation of arbitrators' awards against the claim that they have moved outside their authority:

> [A]n aribtrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrators' words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. p. 597, 80 S.Ct. at 1361.

A second arbitrator cannot be bound by an arbitration award which violates the obligation outlined in *Enterprise Wheel & Car* since the award is not valid and can be set aside. The finality provision of the contract between the parties in this case makes this principle clear since it provides for finality only if the arbitrator's award is "within his jurisdiction and authority as specified in this Agreement."

Since the issue of the setting aside of the Barrett award turns largely on the issue of whether the arbitrator acted improperly by not considering himself bound by the earlier Sabella award, the core inquiry in this case, as both parties recognize, is whether the Sabella award can stand or was outside his jurisdiction and authority. Normally the scope of an arbitrator's jurisdiction and au-

thority is wholly dependent upon the agreement of the parties, since they create the tribunal. But in this case there is an added dimension to this requirement, as will be shown later, by virtue of our decision in *Southbridge Plastics.*

THE TERMS OF THE CONTRACT

The typical collective bargaining contract provides in general that the arbitrator will be used to resolve disputes between the parties as to the meaning, interpretation and application of the provisions of the collective bargaining agreement, *e.g., United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 565, 80 S.Ct. 1343, 1345, 4 L.Ed.2d 1403 (1960), and it nearly always adds a prohibition against the arbitrator adding to, subtracting from, or modifying the agreement in any way. *See Amalgamated Meat Cutters, Etc.* v. *Neuhoff, supra* at 819; 2 BNA, Negotiations and Contracts ¶ 51:281.

The comparable clause in the collective agreement between these parties, Article IV, Sec. 3, is stronger than the typical clause. It reads:

> The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement.

This provision shows a stringent requirement by the use of the word "exclusively" and even more by use of the word "express." The second sentence of the provision withdrawing from the arbitrator any "authority" to "add to, adjust, change or modify any provision" of the agreement also is strong and unambiguous. The use of the word "authority" ties immediately into the reference in the next provision in the contract, Article IV, Sec. 4, printed above, which makes an award final and binding only if it is within the "authority" of the arbitrator.

The district court concedes in its opinion that under the "plain terms" of the contract provisions, the Barrett award was correct and should control, absent other considerations. This conclusion is inescapable since arbitrator Sabella did not even refer to the collective bargaining agreement in his award but referred only to the fact that "it would be unequitable and manifestly unfair" to hold against the employer. There is nothing in the contract about the arbitrator balancing the equities or deciding whether something is unfair or not. Literally, the Sabella decision departed from the terms of the collective bargaining agreement.

THE LAW OF THE CONTRACT

For many years there has been a philosophical and jurisprudential dispute among labor arbitrators as to whether they are entitled to and whether they should look outside the actual wording of the contract to laws which may require the parties to act in ways different from those provided for in the agreement itself. *See* Gorman, Basic Text on Labor Law, p. 543. The discussion, however, becomes unrealistic when the wording of the collective agreement is clearly in conflict with law. It is elementary that a contract provision contrary to law is unenforceable and does not bind the parties. 6A Corbin, Contracts §§ 1373-5; Fairweather, Practice and Procedure in Labor Arbitration, p. 117.

In this case the company relies upon this principle to urge that the law of the contract at the time the grievances arose was the law established by the district court and later reversed by this Court. Within the terms of the contract itself, the company relied upon Article XIV, Section 7, which provides:

> In the event any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting pro-

visions without affecting the remainder of these provisions.

The company contends that the law of the contract at the time these grievances arose was the order of the district court that the conciliation agreement be obeyed—the decision later reversed by this Court. It would follow that if this contention is correct, then the company was complying with the law, and therefore with the law of the contract at the time these grievances arose. This would mean that the Barrett arbitration should be set aside because it did not follow the terms of the contract as effectively modified by the requirements of the law. This would still not necessarily make the Sabella award valid because the Sabella award was not based upon the contract as it applies in the light of the law, but was based solely upon equitable principles and fairness. So under this company theory, the issue becomes whether the Barrett award was within his jurisdiction and authority.

In answering this question the starting point must be that in general the law is now but also has in the past been what the highest tribunal which considers the issue decides is the law. It is in the essential nature of judicial decisions that they normally do not enact law but declare the law which already exists. For example, when one party to a contract declares it rescinded because of a breach by the other party, the first party is running the risk that a court will decide that the other participant in the contract did not engage in a material breach. The rescinding party will find himself liable for damages for an action which he took months before and which he felt was in law a valid action. Of course, other examples abound. Companies may be held liable for triple damages under the anti-trust laws for actions taken years before which the companies felt in good faith were legal at that time. A publisher or author of a book may not know it is obscene or libelous until a jury says so one or two years later, at which time the publisher or author becomes

liable to a jail sentence or damages for something he in good faith believed was lawful to publish.

One of the clearest examples in the law of the situation where persons may in good faith believe they are acting properly but nevertheless be found to be responsible in damages for improper conduct is in the secondary boycott provisions of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (unfair labor practice), and 29 U.S.C. § 187 (creating civil liability for exactly the same conduct). It is well established that a NLRB determination not to prosecute a union for violation of § 8(b)(4) is not res judicata and does not bar a suit for damages under § 187 for the same episode. In other words, the union may not only be in good faith before charges are filed that it is not violating the secondary boycott provisions, it may be further convinced by the Board considering its actions but deciding not to prosecute a complaint under § 8(b)(4), but still be found liable for damages under § 187. *Aircraft & Engine Maintenance & Overhaul, Bldg., Const., Mfg., Processing & Distribution & Allied Industries, Emp., Local 290, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America* v. *Oolite Concrete Co.*, 341 F.2d 210 (5th Cir. 1965), *cert. denied*, 382 U.S. 972, 86 S.Ct. 529, 15 L.Ed.2d 465 (1966). *Accord, Clark Engineering & Const. Co.* v. *United Broth. of Carpenters and Joiners of America, Four Rivers Dist. Council*, 510 F.2d 1075 (6th Cir 1976). *See also Painters Dist. Council No. 38, Broth. of Painters, Decorators & Paperhangers of America, AFL-CIO* v. *Edgewood Contracting Co.*, 416 F.2d 1081, 1085 (5th Cir. 1969). These examples of the usual retroactive effect of an appellate court decision reversing a lower court decision or the decision of an administrative agency can be multiplied a thousand fold.

Does this case fall within the usual pattern arising from the reversal of an administrative decision and a lower court decision? As detailed above, the decision of

the district court in this case which held that the conciliation agreement superseded the seniority provisions of the collective agreement was reversed on appeal by this Court after the Supreme Court had decided *International Brotherhood of Teamsters* v. *United States*. In the *Teamsters* case the Court held that the proviso in Title VII of the Civil Rights Act was clear in establishing that the requirements of the Act did not supersede a bona fide seniority system in a collective bargaining agreement. There is no indication in the opinion that the Court was conceiving of itself as changing the law prospectively. It was relying on the wording of the statute as it was passed and giving its interpretation of the law as it had existed from the enactment of the statute. It freed the union from a lower court decision which had held that the union had participated in violating the law by insisting on seniority rights.

The decision involving these parties which followed that Supreme Court decision in this Court, *Southbridge Plastics Div.* v. *Local No. 759, Etc.*, also declared the law as it had existed throughout. There is nothing in our opinion which indicated that the employer was authorized to have followed the conciliation agreement. Our opinion took its place within the usual and overwhelming pattern of judicial opinions which declare the law as it existed in the past, controlling the actions of the parties. The concluding paragraph of Judge Morgan's opinion in *Southbridge Plastics* reads:

> Finally, having determined that the Company and the EEOC have not shown the seniority system to violate Title VII, that system, as part of a binding agreement between the Company and the Union, must control here. Accordingly, pursuant to that agreement, we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement. p. 917.

This conclusion makes clear the fact that the Court was declaring the law as it had existed between the parties at the time the company was following the conciliation agreement. The opinion referred unmistakably to the company's action in doing so as a "breach" of the binding contract between the parties. This decision embodied the typical result of finding a party in breach of contract and therefore vulnerable to the damages occasioned by the breach. There is not the slightest hint of any recognition that the contract provided otherwise before the decision so that the company could be found acting in accordance with its legal obligations when it was following the conciliation agreement. Instead, our opinion found the company was in breach of the contract during this period.

Under the promises of the parties in this collective bargaining contract, the damages for breach of contract are to be determined through the arbitration process rather than in court. When the case is seen thus in its proper posture, it is revealed with clarity that the Sabella award exceeded any jurisdiction or authority granted him by the collective agreement. This Court held that the seniority provisions of the agreement were in effect, had been in effect throughout, and had been binding. It further held that the company had breached those provisions. Its referral back to the parties to carry out their promise to arbitrate was far narrower than arbitrator Sabella conceived. He was given no authority to ignore the seniority provisions of the contract and to decide the case on the basis of equity and fairness. His award clearly exceeded his jurisdiction and authority.

In a situation with broad similarities, this Court defined the nature of the action we took in the *Southbridge Plastics* decision. The case is *National Airlines, Inc.* v. *International Assoc. of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970). That case was the second appeal in a dispute arising from the mass discharge by the

airline of wildcat strikers while freeze provisions of the Railway Labor Act were in effect. In the first appeal, 416 F.2d 998 (5th Cir. 1969), we held the mass discharge of the strikers under the circumstances exceeded the permissible bounds of National's legal authority to engage in self-help. We held that National was entitled only to hire those replacements for the strikers necessary to be able to operate its airline. The case was then remanded to the district court to determine the rights of the strikers as to reinstatement in accordance with this holding.

In the second appeal, we found that the district court had not followed our mandate. The district court had itself assumed the task of defining again the permissible limits of self-help. After hearing more evidence, the district court had determined that no strikers were entitled to reinstatement. Upon the second review, this Court held the earlier holding had withdrawn from the district court the authority to redefine the permissible limits. We had defined those limits in our decision. Instead, the only matters which the district judge was entitled to determine were the details as to which strikers had not been properly replaced and as to the reinstatement of those strikers.

Substituting in this case the arbitrator for the trial court in *National Airlines*, which is what the parties had provided for in their contract, this case is so closely analogous as to be virtually controlled by our earlier decision in *Southbridge Plastics*. In the last paragraph of Judge Morgan's opinion, quoted above, we withdrew from the authority of the arbitrator any right to decide that the employer had not breached the contract and, therefore, was not liable to the employees for having followed the conciliation agreement. It was determined by the specific holding that the employer had breached the contract. Our interpretation of the contract is res judicata and is binding. Arbitrator Sabella's decision is directly contrary to our holding. He specifically found no breach. This Court's binding decision left as the only issues be-

fore the arbitrator which employees had been victims of the breach and damages for the breach. Our holding meant the arbitrator was no longer free to decide whether the employer should be liable for a breach or not.

In summary, the wording of the contract itself is restrictive enough to reveal that arbitrator Sabella exceeded his jurisdiction and authority, but also he exceeded the authority defined for him specifically by the holding of this Court in the *Southbridge Plastics* decision. Further, this same analysis reveals that arbitrator Barrett's decision is correct under the collective bargaining agreement and under our *Southbridge Plastics* mandate. He applied the seniority provisions of the contract, recognized that the employer had breached them, and he awarded damages to the employees who had been injured by the employer's breach. In doing so he properly refused to follow the earlier Sabella award.

The company urges, however, that the union waived its right to attack the Sabella award by not bringing a suit in court to set it aside. This assertion cannot prevail. The union elected to choose arbitration as the means of setting aside the Sabella award. Under the well established national policy favoring arbitration,[4] this was a proper decision to make. The union had the right to choose this means of attacking the earlier award. As has been pointed out above, there are many instances of second arbitrations being pursued as a means of evaluating the validity of earlier arbitration awards. In *San Antonio Newspaper Guild, Local No. 25* v. *San Antonio Light Div., supra*, this Court upheld as binding a second award which resolved issues left so unclear by a first award that we held the first award unenforceable. It is established that if a party to the contract demands a second arbitration to test the validity of the first arbitra-

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[4] *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236, 1242 (5th Cir. 1975), *rehearing denied*, 526 F.2d 376 (1976), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976).

tion, the courts will order the second arbitration because it is for the arbitrator to determine in the first instance whether the prior award is valid. *Local 103, Int'l U. of Electrical, Radio and Machine Workers* v. *RCA Corp., supra; Avco Local Union No. 787, Int'l U. United Automobile Aerospace & Agricultural Implement Workers of America*, 459 F.2d 968 (3rd Cir. 1972).

A BINDING COURT ORDER?

The conclusion reached immediately above settles the contention of the company that the district judge in the original *Southbridge Plastics* case had issued an order which was binding on the company to apply the conciliation agreement rather than the seniority provision of the collective bargaining agreement. The Court held otherwise by finding the company in breach of contract. But the company contends that it had "no choice" but to obey the order of the district court, even conceding it was voidable on appeal. The company contends that the union should have sought a supersedeas or stay pending the appeal of the decision of the district court which had declared the conciliation agreement applicable (*Southbridge Plastics*). The district judge several times in the case which is before us emphasized in his opinion the fact that the union had not sought a supersedeas.

The impact of this contention must be made clear. The union pursued its remedy by way of appeal to this Court. It did not seek a supersedeas or stay because it followed the district court order pending the appeal. As any law abiding citizen is entitled to do, it bided its time pending its appeal until it could win on appeal.

What the company is urging and what the district judge in this case suggested is that the union should be responsible for obtaining a supersedeas on behalf of and for the benefit of its adversary, the company, so that the company would not be liable in damages if the union won on appeal! Seen in this light, of course, the con-

tention is wholly without merit. The union was not its adversary's keeper. It was pursuing its own lawful remedies in its own way and in no way was defying any decision by the district court.

The company's assertion that it "had no choice" but to obey the order of the district court cannot stand. It did have other choices. It could have appealed. It could have asked for a stay or a supersedeas. It did not do so. Instead it did what many litigants do, it simply predicted the result by obeying the district court and trusting that the decision of the district court would not be reversed on appeal. To do this was within its rights, but having been wrong about the law of the case, it became obligated to pay for the damage done to the employees because it did obey a court order which could not stand on appeal.

The case which faces us is simply a case of a party relying upon an order of a court under appeal to the detriment of other persons injured by the reliance. Without even seeking to appeal, to obtain a stay or a supersedeas, the company cannot now take the position that it "had no choice" but to obey the court order which was based upon an incorrect interpretation of the law. Further, as mentioned above, this Court's decision reversing the district court in *Southbridge Plastics* in terms forecloses as well the assertion of an obligation to obey the district court order. It finds that the employer breached the contract, and the case was returned for the arbitration of the claims of the particular parties injured by that breach. The contention by the company that it was bound and had no choice but to obey is inconsistent with this Court's conclusion that the company had breached the contract by obeying the order.

FAIRNESS AND EQUITY

Closely related to the issue of the asserted binding effect of the order of the district court in the *Southbridge*

Plastics case, is the the general assertion upon which the Sabella arbitration award was based and upon which the district judge in this case heavily relied. Arbitrator Sabella and the district judge asserted that it would be unfair, inequitable, and contrary to public policy to require the company to pay for its actions when it was following what it thought to be the law as exemplified in the conciliation agreement. These assertions that it is inequitable to place this burden upon the company are remarkable in that they do not discuss nor even mention the inequity of the deprivation of the employees entitled by the law of the contract each to his status and to the wages which go with that status.

This entire series of events began because the company was violating Title VII of the Civil Rights Act by discriminating on a racial basis and on the basis of gender. There is no question but that the company was in entire good faith in signing the conciliation agreement with the EEOC and following it. But legally it was wrong. It was breaching the collective agreement the company had with the employees. On the other hand the employees' conduct throughout all of these eevnts was impeccably correct. They had not violated Title VII of the statute. They did not agree to the illegal conciliation agreement. Instead, without defying any court order or acting improperly in any way they pursued their legal rights in court. And they won. Yet it is said that the equities favor the employer.

If the company is excused from paying damages for its failure to follow the seniority agreement, its monetary advantage comes directly out of the wages of the workers who are deprived of the back pay to which they are entitled under those seniority provisions. Relieving the company of its obligations would simply be saying that the employees, those who had done nothing wrong and were correct in the law, must bear the financial loss, and those who did violate the law and later followed a

course of conduct which, while in good faith, was not authorized in the law are excused from financial responsibility. The injustice, unfairness, and violation of public policy of such a conclusion would indeed be shocking. The equities are on the side of those, the employees and their representative, who have not violated any law, even in good faith, who have pursued their rights in accordance with law throughout this entire proceeding, and whose rights were vindicated in court and in arbitration.

It follows that the district court was in error in granting summary judgment for the company. Instead, a summary judgment enforcing the Barrett arbitration award as requested by the union should have been granted.

REVERSED. Defendant's motion for summary judgment is GRANTED.

[DISTRICT COURT OPINION]

U.S. DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

No. EC79-200-OS-P

W. R. GRACE AND COMPANY

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA

July 10, 1980

Order July 21, 1980

Peter G. Nash and Dixie L. Atwater (Ogletree, Deakins, Nash, Smoak, Stewart & Edwards), Washington, D.C., and James E. Price and Robert Krohn (Price, Krohn & McLemore), Corinth, Miss., for plaintiff.

Danny E. Cupit and Bobby Sneed, (Cupit & Maxey), Jackson, Miss., for defendant.

Full Text of Oral Opinion

SMITH, Senior District Judge:—The bench opinion which I am about to render will constitute my findings of fact and conclusions of law with reference to the two motions which are presently pending before the Court. If the opinion is transcribed for any reason, I reserve the right to edit it before it is released, or change or modify it in any way that I see fit.

This litigation is, by no means, a stranger to the Court. I have been involved in several cases in connection with the operation of the Southbridge plant in Corinth, which is owned and operated by W. R. Grace and Company, the plaintiff in this case.

If there is an issue as to a material fact in the case, or if there is a conflict with reference thereto, motions for summary judgment should not be granted, but the case should be allowed to go to trial upon its merits. It is apparent, however, in this particular case, that there are no relevant issues which are in controversy; the facts are well pleaded and well known by all of the parties. It is a matter for the Court to apply the law as I find the law to be to the facts as the facts are shown by the record in this case and to come to a conclusion as to which of the motions for summary judgment should be granted.

As a background, however, for my decision in the case, if there is an appeal to the Fifth Circuit, I would like to state certain facts that are reflected by the record. Many of these are well pleaded in the complaint, and I will refer to some of the allegations in the complaint as stating the facts which I find exist and are not in controversy.

This litigation involves the employer, W. R. Grace and Company, and the union, Local Union No. 759, International Union of the United Rubber, Cork, Linoleum, and Plastic Workers of America, who, upon its collective bargaining agreement, represents the employees or most of the employees in the Corinth plant. In this case, the facts involved show that the union represents the employees in the arbitration of grievances which have been filed against the company by the union in favor of its members.

The record shows that I find the fact to be that the parties' 1979 collective bargaining agreement, as well as the 1974 and 1977 agreements, provide that layoffs will be determined solely by employee seniority, except in special circumstances not here pertinent.

On October 5th, 1973, as a result of a charge filed against the company, the Equal Employment Opportunity

Commission (EEOC) determined that reasonable cause existed to believe that the seniority provisions of the collective bargaining agreement were unlawful because they perpetuated the effects of the company's prior hiring discrimination practices against women.

On December 11th, 1974, in order to correct this discriminatory labor practice, the company entered into a conciliation agreement with the EEOC which provided, among other things, that certain seniority provisions of the collective bargaining agreement between the company and Local 759 would be superseded by a system to determine layoffs so that the percentage of women employed by the company would never be reduced by a layoff. The union objected to this change in the seniority provisions of the collective bargaining agreement and sought to have the dispute resolved by arbitration pursuant to the arbitration provisions of the collective bargaining agreement.

The company refused to arbitrate this dispute, and filed suit against Local 759 in Cause No. EC74-90-S in the United States District Court for the Northern District of Mississippi, Eastern Division, seeking to enjoin the union from arbitrating grievances where relief sought in arbitration would conflict with the terms of the conciliation agreement.

The EEOC became a party defendant in that case and counter-claims were filed against the company and cross-claims against Local 759, seeking a declaratory judgment that the provisions of the conciliation agreement, superseded any contradictory provisions in the parties' collective bargaining agreement.

On November 23rd, 1975, a final order was entered in Cause No. EC74-90-S, determining that the conciliation agreement was binding on the company and Local 759 and superseded any conflicting provisions of the collective bargaining agreement.

The determination by the EEOC that the company, the plaintiff in this case, discriminated against women in their hiring practices was issued on October 5th, 1973, and contained specific information which I will read into the record.

With reference to respondent's female employment, respondents employ approximately 40 females of a total of approximately 690 employees. All 40 females are employed in the clerical department.

Departmental and plant-wide seniority perpetuates past discrimination against white women who, prior to 1970, were not employed in sufficient numbers and who continue to be confined to certain job classifications; and against black males, who prior to 1969 were not promoted in significant numbers, and who continue to be confined to certain job classifications.

Since respondent has not employed black females in significant numbers in any category, the seniority system will only have a discriminatory impact upon them at some future date.

Accordingly, the EEOC found such a seniority system to be unlawful.

The company was invited to enter into a conciliation agreement, and an agreement was entered into between the EEOC and the company on December 11, 1974. It provided in pertinent part: "The respondent agrees that notwithstanding any provisions of any collective bargaining agreement to which it is a party at its Corinth facility, including a contract with International Union of Rubber, Cork, Linoleum, and Plastic Workers of America and its Local Union No. 759, that the respondent will adhere to the following: a) no female employee whether employed at the present time or hired at future date will be removed from her job or her shift by a male

employee by utilization of the shift preference provisions of any collective bargaining agreement in effect at the Corinth facility; and b) in the event it becomes necessary for the respondent to lay off employees who are covered by any collective bargaining agreement in effect at the Corinth facility and said layoff will result in females being laid off if the applicative provisions of the collective bargaining agreement were utilized in a greater percentage than they constitute the bargaining unit, the following procedure will be utilized . . . ." It then sets forth the procedure in the conciliation agreement, which is at odds, of course, with the seniority provisions of the collective bargaining agreement.

The company filed an action, as I have stated, and on November 26th, 1975, in No. EC74-90-S, the Court entered an order which provided among other things, that: (1) the terms of the conciliation agreement executed on December 11th, 1974, between the plaintiff (W. R. Grace) and defendant (EEOC) are binding upon all parties to this action; and (2) the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759, conflict with the provisions of the conciliation agreement executed by the plaintiff and the defendant EEOC. The court found the latter provisions to be controlling, and all parties to that action were to abide thereby. Southbridge Plastics Division v. Local 759, 403 F.Supp. 1183 (N.D. Miss. 1975).

That case was appealed, however, to the Court of Appeals by the union. The union did not seek to have a stay of the order during the pendency of the appeal, nor did the union seek to supersede the order in any manner. Even though the appeal was perfected, it did not affect the validity of the order during the pendency of the appeal.

During the interim between my decision in the case and the decision by the Fifth Circuit, the Supreme Court of the United States decided the case of United States v. International Brotherhood of Teamsters, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 3896 (1977), and in connection with the appeal in the Southbridge case, the panel of the Fifth Circuit which was considering the appeal issued its decision reversing this Court's judgment. The reversal was entered January 9th, 1978, and provides in pertinent part: "The union contends that a recent Supreme Court decision, United States v. International Brotherhood of Teamsters (citations omitted), compels this Court to reverse the District Court's order upholding the conciliation agreement. We agree." Southbridge Plastics Div. v. Local 759, 565 F.2d 913 (5th Cir. 1978).

So, between the time I had entered my opinion and order and the time the Fifth Circuit arrived at its decision, the intervening Teamsters case had been decided, and it changed the law a great deal in connection with the matters which were then involved in the Southbridge case.

The Fifth Circuit concluded that in Teamsters, a Title VII case, the Supreme Court held that a bona fide seniority system, which is a system negotiated and maintained without a discriminatory purpose, is protected by § 703(h) of Title VII, even though the system might perpetuate post-Act discrimination.

Then the Court concluded, and I quote from the opinion: "Finally, having determined that the Company and EEOC have not shown the seniority system to violate Title VII, that system, as a part of a binding agreement between the Company and the Union, must control here. Accordingly, pursuant to that agreement, we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employ-

ment of the conciliation agreement, of the seniority provisions contained in the agreement." 565 F.2d at 917.

The particular question involved here is whether, during the pendency of the appeal, the grievances which might have occurred during that time can now be arbitrated, or whether they are not subject to arbitration because of the binding effect of the Court's previous order. That is one of the questions before the Court.

The other question is whether previous arbitration proceedings before Arbitrator Sabella are controlling and his decision should have been recognized by Mr. Barrett when he acted as the second arbitrator in the grievances which are now at issue before the Court.

On a day subsequent to August 16th, 1978, Mr. Sabella, who acted as the arbitrator in Albert L. Jowars, Case No. 78-7, held: "Unquestionably in the period of the violation, the employer was acting in concurrence with the District Court's order as it was required to do. There is no evidence that the employer was not acting in good faith and in accordance with the legal court order. The employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be unequitable and manifestly unfair to penalize the employer under these circumstances."

The decision by Mr. Sabella was not recognized by Mr. Barrett, because he contended that Mr. Sabella had exceeded the scope of his jurisdiction, going outside the plain, written terms of the contract between the union and the company in order to arrive at that conclusion. Of course, if the matter was to be decided solely upon the contract itself and on its terms without any reference to the procedures before the Court, I would have to hold that the grievances could and should have been arbitrated;

and that within the plain terms of the contract, Mr. Barrett would be right in his conclusions.

However, I think we must look at public policy in matters of this kind. EEOC is charged with the statutory duty to eliminate discrimination in employment practices on account of race, creed, religion and sex. Acting on that authority, EEOC came into contact with the plaintiff in this case, and after investigation of the matter, arrived at the conclusion that its practices in the employment of blacks and women had a discriminatory effect against people in those categories. The agency demanded that Southbridge enter into a conciliation agreement, for which provision is made in the Act, in order to avoid court procedure in effecting the purposes of the Act and removing discriminatory practices of employment.

In so doing, the EEOC found that the seniority provisions of the collective bargaining agreement with the union would conflict with the provisions of the conciliation agreement.

The company was faced with the question of whether it should abide by the terms of the conciliation agreement or by the terms of the collective bargaining agreement and thereby render itself potentially liable in an action brought by the EEOC. The company decided to have a judicial determination of that matter, and it presented the facts to the Court. The EEOC came into the case, presented the facts to the Court, and on facts which then existed, the Court found under the prevailing law at the time, the collective bargaining agreement would have to give way to the provisions of the conciliation agreement.

The union was dissatisfied with the Court's judgment in the case and appealed to the Fifth Circuit. But, in doing so, the union did not take any action to stay the Court's order by taking a supersedeas bond so as to make the Court's order ineffective.

The union elected to go along without asking this Court or the Court of Appeals for a stay. In the meantime, as I have said, there was a change in the applicable law.

The contract itself provides in Article IV, paragraph 3, that "The jurisdiction and authority of the arbitrator of the grievance in his opinion and award shall be confined exclusively to the interpretation and application of an express provision or provisions of this agreement at issue between the union and the company. He shall have no authority to add to, adjust, change or modify any provision of the agreement."

Paragraph 4 of the same article states, "The decision of the arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this agreement shall be final and binding upon the aggrieved employee or employees, the union and the company."

Article XIII of the contract contains a nondiscrimination provision, which provides that both the company and the union agree that they will not discriminate against any employee because of sex, race, color, creed, age, nationality or religious beliefs, and that both parties will abide by and comply with all applicable federal laws banning discrimination in regard to hire, promotion, and job assignments. It is understood that the application of this article and this section applies specifically to such discrimination due to employee sex, race, color, creed, age, nationality or religious beliefs.

Then a general provision under Article XIX provides, "In the event that any provision of this agreement is to be found in conflict with any state or federal law now existing or hereafter enacted, it is agreed that such law shall supersede the conflicting provisions without affecting the remainder of these provisions."

It is my opinion that these two paragraphs were a part of the collective bargaining agreement under Arbitrator's Sabella's jurisdiction and consideration at the time he rendered his opinion, and that during the pendency of this Court's order which was in effect and had not been superseded, the company, the union and the EEOC, were bound by its terms and conditions. If the order had been violated in any respect by any of the parties, the parties would have been subject to a contempt action on the part of the Court because of failure to comply with the Court's order.

I do not believe that public policy will permit that kind of a situation to exist and not give some protection to the people who are parties to the collective bargaining agreement, especially in the absence of a stay or in the absence of some petition to the Court to permit grievances to be arbitrated while an appeal is in progress.

In addition, at that time, this Court's order was the law of the case, as well as the law of the collective bargaining agreement. The Court had specifically held that the conciliation agreement provisions had the effect of nullifying the seniority provisions in the collective bargaining agreement when such came in conflict with the provisions of the conciliation agreement. That conciliation agreement was designed, in the opinion of the EEOC, to eliminate all vestiges of discrimination against women, as is involved in this case, and blacks, which are not involved here.

On the basis of my holding and upon the basis of the undisputed facts which are in this record, I find first, that any grievance that arose prior to the reversal of this Court's order by the Fifth Circuit cannot be the subject of a grievance under the collective bargaining agreement. The company and all the other parties in-

volved in the grievance were affected by that order, and grievances involving actions by the company during that period of time are not such as can be arbitrated. Upon the Fifth Circuit's reversal of this Court's judgment, the Court was directed to enter an order providing that the union should prevail and that the contract provisions of the collective bargaining agreement would govern seniority matters; that order was entered by the Court in compliance with the mandate of the Court of Appeals.

From that time on, the seniority provision of the union's collective bargaining agreement with the company has prevailed and will be enforced.

Secondly, I find that Arbitrator Sabella acted on a matter which was essentially the same as the matter involved in this case; that is, a layoff. In that layoff the female was retained over a male employee who had greater seniority. There is some argument made here that the facts are different because in one case there was a demotion which was involved, whereas here, there is a layoff. I do not believe that such a difference exists, because the effect of the layoff in the prior case was the same: The male employee who was laid off had the right to take the job of someone down the line who did not have as much seniority; the effect being to demote an employee to a lower-paying position. I do not think that there is any difference between the two situations. The essential factor in Sabella's decision was that during the pendency of the appeal, the order of the court was in effect and had to be obeyed by the parties.

There is some argument made with reference to the case of San Antonio New Guild, Local 25 v. San Antonio Light Division, 481 F.2d 821, 83 LRRM 2728 (5th Cir. 1973), being dispositive of this case. However, I think it can be distinguished from the facts here involved.

In that case, there was the question of ambiguity of the first arbitrator's award as to the amount of back

pay that the terminated employee was entitled to receive. When the dispute arose as to the amount of the award, rather than the award itself, it was referred to another arbitrator by consent of the parties and settled by the second arbitrator. The Fifth Circuit said that it would be useless to remand the case for the matter to be referred to the first arbitrator for clarification.

I do not feel that that case is controlling.

My decision is, in summary, that the motion for plaintiff for summary judgment should be granted and the motion by the defendant for summary judgment should be denied.

Counsel for plaintiff may submit to the court within 10 days an order to carry into effect the Court's ruling.

Is there any question now by any of the parties involved in this matter?

MR. SNEED:

No, Your Honor.

THE COURT:

The plaintiff?

MR. NASH:

No, Your Honor.

THE COURT:

All right. The Court will be in recess then until 2:00 o'clock this afternoon.

Order

This cause being heard on Plaintiff's and Defendant's cross-motions for summary judgment, and the Court having fully considered the positions of the parties and finding that there is no genuine issue of material fact and further finding, for the reasons stated in the Court's decision rendered on July 10, 1980, that Plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is granted and that the arbitration award of Gerald A. Barrett is hereby vacated and denied enforcement, and it is

FURTHER ORDERED, that Defendant is hereby permanently enjoined from prosecuting any other or further grievances to arbitration because of lay offs made or other actions taken by Plaintiff in accordance with the provisions and requirements of its December 11, 1974 conciliation agreement with the EEOC if such actions were taken prior to the time this Court's November 1975 Order in Case No. EC74-90-S was vacated, and it is

FURTHER ORDERED, that Defendant's Motion for Summary Judgment is denied.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3661

D. C. Docket No. EC79-200-S-P

[Filed Oct. 26, 1981]

W. R. GRACE AND COMPANY,
Plaintiff-Appellee,

VERSUS

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and defendant union's motion for summary judgment granted.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1981

A true copy

Tests GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ R. Adeline Barnes
Deputy
New Orleans, Louisiana

Issued As Mandate: Oct. 16, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3661

W. R. GRACE AND COMPANY,
Plaintiff-Appellee,

VERSUS

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 10, 5 Cir., 1981, —— F.2d ——).

(September 28, 1981)

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative

Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerre S. Williams
United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for stay of the mandate.

[1975 ORDER OF THE DISTRICT COURT]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 74-90-S

SOUTHBRIDGE PLASTICS DIVISION,
W.R. GRACE & COMPANY,
Plaintiff

v.

LOCAL 759, INTERNATIONAL UNION OF THE
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC
WORKERS OF AMERICA AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants

ORDER

Defendant, Local 759, having moved to dismiss the cross-claim of defendant, Equal Employment Opportunity Commission (hereinafter EEOC), and defendant, EEOC, having moved for summary judgment on its cross and counterclaim on the ground that there is no genuine issue as to any material fact and that the defendant, EEOC, is entitled to judgment as a matter of law,

Now on considering the pleadings and exhibits submitted by the parties; and after hearing counsel for the respective parties, and due deliberation having been had, it is, for the reasons cited in my decision of November 3, 1975,

ORDERED, that defendants, Local 759, motion to dismiss be and the same hereby is denied, and, for the reasons specified in my decision of November 3, 1975, it is further

ORDERED, that defendant's, EEOC, motions for summary judgment be and the same hereby are granted,

and that summary judgment be entered herein in favor of the defendant, EEOC.

IT IS FURTHER ORDERED THAT:

(1) The terms of the conciliation agreement executed on December 11, 1974, by the plaintiff and the defendant, EEOC, are binding upon all the parties to this action; and

(2) Where the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759, conflict with the provisions of the conciliation agreement executed by the plaintiff and defendant, EEOC, the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby.

IT IS FURTHER ORDERED that the court shall retain jurisdiction of this matter until March 20, 1977, and that the costs of these proceedings be assessed against the defendant, Local 759.

This 26th day of November, 1975.

/s/ Orma R. Smith
United States District Judge

IN THE MATTER OF ARBITRATION BETWEEN

Grievance No. 78-7

HATCO PLASTICS DIVISION/
W. R. GRACE AND COMPANY,
Employer

and

LOCAL UNION 759, THE INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Union

OPINION AND AWARD

The hearing was held 8/16/78 in Corinth, MS before the undersigned duly selected by the parties.

The following appearances were noted: Terry Cole, Director Human Resources for the Employer; Larry S. Bridges, Local President for the Union.

The parties were afforded full opportunity to present any and all evidence on their behalf. Based on the entire record, including stipulations of fact and argument of the parties, the following is found.

The grievance dated 3/3/78 by Albert L. Jowers complains that he was improperly laid off as a laminating operator and a female junior employee retained. Grievant requests reinstatement to his job and to be made whole.

An understanding of the grievance requires an explanation of the context in which it arose.

In 1972 a charge of racial discrimination was made by an individual who had applied for employment in a non-unit job. In the course of the investigation the EEOC determined that there had been sex discrimination because not until 1974 were females employed.

In 1974 the EEOC and the Employer entered into a conciliation agreement. The Union was invited to join in but declined.

A key provision of the conciliation agreement suspended, in effect, the seniority provision re layoffs, etc. as it applied to females in order to remedy the effects of past discrimination.

Thereafter a dispute arose between the parties because of the Employer's refusal to arbitrate certain grievances which the Employer felt would violate the conciliation agreement, if the Union would have been successful before the arbitrator. It would appear that the union would have been successful as the contract seniority agreement went by strict seniority.

The Employer filed a complaint for a declaratory judgment naming the Union as a defendant and later adding the EEOC.

The U.S. District judge ruled in favor of the Employer and EEOC holding that the seniority provisions of the conciliation agreement superceded the seniority provision of the collective agreement.

The Union appealed to the 5th Circuit and on 1/9/78 the Appellate Court reversed the District Court. The order on the mandate came shortly thereafter.

It was stipulated that grievant had more seniority than the female who was retained. It was further stipulated that on 3/8/76 there was a plant reduction and grievant was reduced to an assistant operator and the junior female retained as a junior. This situation prevailed until 5/17/76 when grievant was recalled as an operator. On 10/29/76 grievant was laid off from the plant and the junior female remained as an operator. On 11/12/76 grievant was recalled as a print tender (Labor Grade 3). The junior female was still an operator (Labor Grade 7). On 5/7/78 the junior female was laid off as a direct result of the 5th Circuit's decision.

There is a dispute between the Union and Employer as to the period covered by the grievance. The Union contending that the grievance is from 3/8/76 to the present.

In light of my decision this difference is immaterial. The facts clearly show that the Employer went by the conciliation agreement as it felt it was bound to by the District Court's order. The Employer readily admitted, that as a result of the 5th Circuit's opinion it applied the contract seniority provision and that it was, or would be liable if the matter complained of occurred subsequent to the Appellate Court's decision.

Insofar as the grievant is concerned the matter is moot because he could not be reinstated to the operator's job as the job or jobs are occupied by senior employees. At most back pay would be involved for the alleged period of violation.

Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances.

The award is: The grievance of Albert L. Jowers, No. 78-7 is denied.

/s/ Anthony J. Sabella
ANTHONY J. SABELLA
Arbitrator
August 17, 1978

IN THE MATTER OF THE
ARBITRATION BETWEEN

W. R. GRACE AND COMPANY,
SOUTHBRIDGE PLASTICS DIVISION
CORINTH, MISSISSIPPI,

—and—

UNITED RUBBER WORKERS,
LOCAL NO. 759

#74-170-127 filed 12/18/74
#75-2-132 filed 1/29/75
No Number filed 11/5/76

Appearances: Mr. T. P. Cole, for the Company;
Mr. G. W. Clark, for the Union

OPINION

Three grievances concerning similar circumstances and events have been submitted for resolution in this proceeding. The disputed cases were joined together at the hearing as essentially one grievance, although they arose separately over a two year period. The basic issue to be resolved is whether the Company is liable to the grieving employees for honoring a Conciliation Agreement between it and the Equal Employment Opportunity Commission (EEOC), when in so doing the Company thereby breached their rights under the seniority provisions of the collective bargaining agreement.

The applicable facts are without significant dispute and concern a background which commenced some seven years ago. In 1972 two black males who were unsuccessful applicants for employment filed a complaint with the EEOC charging the Company with race discrimination in its hiring practices and job classifications. The EEOC responded with an investigation and on October 5, 1973 issued a reasonable cause determination broadening the

original charge by finding that the Company had engaged in unlawful employment practices involving not only race discrimination but also sex discrimination. The Company did not contest this EEOC determination nor did it contest the proposed EEOC remedy, instead executing in 1974 without the participation or agreement of the Union a Conciliation Agreement with EEOC which among other things set aside the negotiated seniority provisions in the Labor Agreement previously executed by the Company and Union to the extent of granting a form of superseniority to female employees.

The Union thereafter filed grievances under its collective agreement with the Company protesting Company violations of individual seniority rights as a result of Company compliance with the Conciliation Agreement. The Company declined to arbitrate these grievances, instead in July 1974 commencing suit in the United States District Court for a declaratory judgment seeking to determine whether the terms of its Conciliation Agreement with EEOC superseded conflicting provisions in its collective agreement with the Union. Throughout the federal court proceedings, which occurred both in the District Court and in the Court of Appeals for the 5th Circuit between July 1974 and January 1978, the Company continued to follow the terms of its Conciliation Agreement with EEOC. Specifically in December 1974 and periodically thereafter economic layoffs were necessitated and, in selecting those employees to be laid off, the Company abided by the seniority provisions of its Conciliation Agreement pursuant to the EEOC determination that the contractual seniority system, although not discriminatory on its face or in its purpose, nevertheless served to perpetuate past discrimination and was therefore illegal. As a consequence senior male employees were laid off while junior female employees were retained at work.

The declaratory judgment litigation instituted by the Company in July 1974 resulted in a U. S. District Court

decision in November 1975 holding that the Conciliation Agreement between the Company and EEOC overrode the conflicting terms of the collective agreement between the Company and the Union. The Company was therefore directed by the District Court to continue to comply with the Conciliation Agreement rather than the collective agreement, and the Company did so. However the Union, a defendant in the declaratory judgment action, appealed the District Court ruling and on January 9, 1978 obtained a reversal from the 5th Circuit Court of Appeals which relied upon the 1977 decision of the Supreme Court of the United States in *U. S.* vs. *Teamsters*, 431 U.S. 324, holding that a bona fide seniority system negotiated and maintained without a discriminatory purpose is protected by Section 703 (h) of Title VII even though the system might perpetuate the effects of an employer's pre-Act or post-Act discrimination. The 5th Circuit consequently held that the collective agreement necessarily prevailed over the Conciliation Agreement, and directed the Company to arbitrate the previously-filed grievances arising out of the Company violation of the collective agreement due to its adherence to the conflicting Conciliation Agreement with EEOC. At this time during January 1978 the Company abandoned any further compliance with its EEOC Conciliation Agreement and returned to the application of the seniority provisions negotiated between the Company and the Union in their collective agreement.

The final legal result in the Federal Courts, therefore, was the reinstatement of the collective agreement in January 1978 and thereafter. However, in the period between 1974 when the Company entered into the EEOC Conciliation Agreement in place of its collective agreement with the Union and January 1978, the parties were faced with pending Union grievances which were ruled by the 5th Circuit in January 1978 to be subject to the arbitration provisions of the collective agreement. This process commenced with the arbitration of one grievance #78-7, on August 16, 1978 before Arbitrator Anthony J.

Sabella. The facts involved the demotion and subsequent layoff of a male employee senior to a female employee who was neither demoted nor laid off at the time of the grievance, because of the Company's adherence to the EEOC Conciliation Agreement instead of the collective agreement. On the next day immediately following the hearing, August 17, 1978, Arbitrator Sabella issued his decision denying the grievance upon the following stated ground in his opinion:

> "Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances."

It is upon the foregoing state of facts that the present three grievances must be resolved in this proceeding. It is agreed that on December 19, 1974, on January 28, 1975, on January 31, 1975, and on November 1, 1976, the Company for economic reasons laid off senior male employees while retaining junior female employees in accordance with its EEOC Conciliation Agreement. It is thus evident that, except for the inconsequential difference that the August 1978 arbitration involved a demotion while the instant proceeding involves layoffs, the central issue here is precisely the same issue heard and decided by Arbitrator Sabella. Despite that decision in #78-7 the Union rests upon the undisputed seniority provisions of its collective agreement with the Company, and seeks lost seniority rights, lost back pay and any other lost benefits to the grievants who were improperly laid off on the specified dates. In the Union view the Sabella decision in #78-7 is not binding in this proceeding because the Arbitrator in the case exceeded his con-

tractual authority in Article IV, Section 3 by failing to confine his decision

> "—exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company."

The Company argues in an able brief supported by substantial authority that the decision of an Arbitrator under Article IV, Section 4 "shall be final and binding", and that the Sabella decision in #78-7 therefore constitutes a decisive bar to the Union position in this case. The Company further emphasizes that it at all times sought only to ascertain and to abide by what it considered to be the applicable rule of law, that it followed the Conciliation Agreement with EEOC and not the labor agreement with the Union during the period when the Conciliation Agreement and the subsequent U. S. District Court decision appeared to be legally effective, that it immediately changed its course and reverted back to the labor agreement when the Circuit Court of Appeals so ruled, and that it could not conceivably have anticipated the shifting legal tides to which it was subjected during this period. The Company stresses that it based its action upon the state of the law known at the time as declared in some 30 judicial precedents plus academic commentaries prior to *U.S.* vs. *Teamsters* in 1977, which established a previously unpredictable rule. The Company consequently fully agrees with the rationale expressed in the Sabella decision that it would be "inequitable and manifestly unfair" to subject it to a penalty under these circumstances.

The Arbitrator has carefully reviewed the testimony, the briefs, and the extensive exhibits, and finds that no alternative exists except the granting of the Union grievances. The parties are entitled to a candid statement of the weight, if any, to be attributed to the Sabella

decision in #78-7. The authorities cited in the Company brief correctly set forth the applicable rule that a decision by an Arbitrator is not only final and binding upon the parties in the immediate dispute, but additionally should be followed in all future like disputes between the same parties under the same contract. Although this rule appears to echo the doctrines of stare decisis and comity in the legal system, it is actually grounded upon the contractual provision that an award shall be final and binding, coupled with the unique necessities of the parties to a collective agreement who live within a continuing rather than an ad hoc relationship. In such a relationship, order and stability will be severely jeopardized if the losing party in the forum of arbitration is free to try the case again before a different Arbitrator with an actual opportunity to obtain a different result. It is thus essential to the stability of their relationship that both parties be bound by whatever award flows from their forum of arbitration, so long as the award does no obvious violence to their contract, and that the remedy of the losing party be limited to the arena of collective bargaining in the next period of negotiations rather than to a return match before a different Arbitrator.

This Arbitrator subscribes fully to the foregoing, and emphasizes that he has invariably followed a prior award between the same parties under the same contract in the light of an obligation to the parties. And this obligation exists regardless of any personal evaluation of the relative merit in the prior award. It will not do for an Arbitrator to follow those prior awards involving the same parties under the same contract with which he is in agreement, and to refuse to follow such prior awards with which he personally disagrees. He must inevitably follow all such awards without any picking or choosing, so long as they are issued within the authority of the Arbitrator and flow from the jurisdiction conferred upon him by the contract.

The essential difficulty with the Company position is that it is relying upon an award which is wholly at variance with the contract and with the Arbitrator's jurisdiction in #78-7. The opinion in #78-7 rests upon a finding that it would be "inequitable and manifestly unfair to penalize" the Company. There is small point in plunging into the thicket of inequity and unfairness, inasmuch as precise standards are non-existent and reasonable people including even Arbitrators may differ, but a balancing of the scales does require note that the grieving laid off employees have also been penalized by the decision of the Company to comply with the Conciliation Agreement while violating the collective agreement. It is fruitless to attempt to evaluate or to quantify the greater penalty in the event of an adverse decision, whether on the Company or on the grievants. It is enough to observe that a decision in either direction will necessarily result in the levying of a penalty upon one side or the other. More importantly for purposes of the issue in this proceeding, it must be further observed that neither side is entitled to insulation from a penalty by virtue of any cited provision in their contract, and it is the contract rather than any claimed principles of equity which must control the outcome of this proceeding. Article IV, Section 4 provides as follows upon this subject:

> "The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company."

The jurisdiction and authority of the Arbitrator "as specified in this Agreement" are set forth in Article IV, Section 3 which provides:

> "The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of

> this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement."

The jurisdiction and authority are drafted and here expressed with somewhat stricter limitations than the "interpretation and application" which normally prevail in collective bargaining agreements. The Arbitrator is "confined exclusively" to the function of interpretation and application, and he may only exercise that function of interpretation and application with respect to "the express provision or provisions" of the contract at issue between the parties.

It is in this light that it must be found that the opinion and resulting award in #78-7 departed in all respects from the jurisdiction and authority of the Arbitrator in that case. The "express" provision at issue was Article VIII, Section 4 protesting the layoff of employee Jowers while a junior female was retained. The issue was whether or not the Company had violated that "express" provision. The ruling of the Arbitrator that it would have been inequitable and manifestly unfair to penalize the Employer, is wholly unsupported by any express provision of the contract, and there is no contention to the contrary either by the Arbitrator in #78-7 or by the Company throughout this proceeding. The Arbitrator in #78-7 thus failed, as he was enjoined by the contract, to "confine" himself "exclusively" to the interpretation and application of any "express" provision of the contract. By so failing, and by fashioning a decision based upon equity utterly unrelated to any provision of the contract, he acted without his authority and jurisdiction as defined in the contract. There is consequently no interpretation or application in #78-7 to be followed in this proceeding, and this Arbitrator to be consistent with his contractual authority and jurisdiction must necessarily ignore #78-7 and instead resort to the applicable

express provisions of the contract. There is no genuine issue upon this phase of the case, inasmuch as the Company does not dispute that it violated its contract with the Union while following the Conciliation Agreement, and it must therefore be found that the Company violated the rights of the grievants in Article VIII, Section 4 and that its action in following the Conciliation Agreement constitutes no valid defense to such violation under the contract which controls in this proceeding.

The Arbitrator is mindful of the Company argument that it has acted in good faith, that in entering into the EEOC Conciliation Agreement it relied upon numerous court decisions at that time which supported its action, and that it could not have anticipated the ultimate decision of the Supreme Court of the United States in *U.S.* vs. *Teamsters* in 1977 and the unexpected consequences of that decision. There is no suggestion in the evidence that the Company at any time herein acted with any motive except good faith. But it is not enough to have acted with good faith, since Article VIII, Section 4 makes no allowance for such a motive and this Arbitrator lacks the authority and jurisdiction to give weight to the obvious good faith of the Company. It may only be added that we are all bound by the law as it is finally declared by the tribunal of highest authority and, in the absence of such a final declaration, that we all act at our peril in relying upon the decisions of tribunals of lesser authority. It was the Company, and not the Union or the grieving employees, which elected to assume the risks of its decision in 1974 to sign an EEOC Conciliation Agreement which in part abrogated its agreement with the Union. The Company may not now validly complain of the unforeseen consequences of that 1974 decision when the Company, however proper its motives may have been, adopted a course of action found three years later to constitute a violation of law. The alternative urged by the Company, that it now be absolved because the weight of lower courts supported its action

in 1974, has no support in the legal system and is so unworkable as to be lacking in any merit.

For the foregoing reasons the award grants the submitted Union grievances.

AWARD

Grievance #74-170-127, filed on December 18, 1974, and Grievance #75-2-132, filed on January 29, 1975, and the unnumbered Grievance, filed on November 5, 1976, are all hereby granted, the Company to compensate the grievants laid off in violation of Article VIII, Section 4 with lost pay, lost seniority, and any other lost rights, from the date of their layoff to not later than the date in January 1978 when the Company renewed its compliance with its collective bargaining agreement with the Union.

/s/ Gerald A. Barrett
GERALD A. BARRETT
Arbitrator

Dated: June 1979

[RELEVANT PORTION OF TRANSCRIPT OF DISTRICT COURT'S ORAL RULING IN *Local 223, Utility Wkrs. v. The Detroit Edison Co.*]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 81-70694

LOCAL 223, UTILITY WORKERS UNION OF AMERICA,
Plaintiff,

v.

THE DETROIT EDISON COMPANY,
Defendant.

Motion to Intervene and Motion for Summary Judgment in the above-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, December 11, 1981.

* * * *

[56] THE COURT: I'm not saying all affirmative action but affirmative action of this kind can cause one person to be promoted over another in a seniority system. I would not want to imply or say all affirmative action hurts innocent people, but sometimes it does.

MR. MAZEY: No question.

THE COURT: Particularly court-ordered.

MR. MAZEY: But should it? You see it does but if the court can fashion a way that it doesn't hurt anybody that is what the court ought to do. What we are saying is let us go tell the arbitrator our tale of woe and let them go argue what they want to and let the arbitrator say, "Look, you breached the contract. This guy should have been promoted three months before you promoted him six months before. Pay him the damages." That's it.

THE COURT: Mr. Mazey, I appreciate your position. I appreciate all of your positions.

The first thing, I guess, I granted the [57] motion to intervene. In this case, as I see it, the Detroit Edison Company was ordered to grant in effect some seniority to some persons on the basis of discrimination. It never was determined there was not discrimination. What the Supreme Court set aside was the remedy. I think that is important to remember.

The Detroit Edison Company resisted it all the way, tried to get a stay, went to the Supreme Court and eventually was successful, but in the meantime in compliance with an order which they had to do or would have been in contempt otherwise; they had absolutely no choice about it. The very Supreme Court that set aside the order would have, I have no question at all, upheld the contempt citation against the Detroit Edison for noncompliance and probably granted damages to boot.

In the meantime Detroit Edison Company in carrying out the order took action which would have constituted a breach of contract and probably did, but at least it would have if they had done it voluntarily. It's as simple as that.

The EEOC comes in and argues to allow the payment of damages under these circumstances would be disastrous to the whole structure because it would discourage every single kind of consent judgment in which this kind of relief was granted. I do believe that a good [58] argument can be made against apply this sort of situation to a conciliation order voluntarily entered into. I don't think somebody should be able to make one contract and then make another contract and use the second contract they entered into voluntarily as an excuse for breaching the first contract.

If that slows down the conciliation process that's tough because otherwise the conciliation process has too much

potential, pretty soon it will be, "Which way do we get out of this cheapest" not "Which way is best or right."

But I do really believe that what the Detroit Edison Company did here they did under compulsion. They fought it all the way and it would be contrary to public policy to permit, for the Court to lend its hand, if you will, whatever they do I'm not talking about, but for the Court to lend its hand or order the Detroit Edison Company to submit to arbitration which could cause them to pay out money for compliance with a valid—valid, no —an enforceable court order, and that is the bottom line of this lawsuit.

If we must distinguish between Dennison and Grace, I think the Dennison court is a very reasoned opinion. I think the Grace case can be differentiated because there wasn't the same resistance in the Grace case [59] that we have in The Detroit Edison Company here.

Therefore, with real concern for the fact that I think some innocent people here, at least people who had not done anything wrong, they are not getting relief from the wrong done them, but I grant the Edison Company's and intervenor's motion for summary judgment and dismiss the case.

It's an extremely important case. It's a well argued, well reasoned case on both sides. I'm not unsympathetic with the fact that there was some language in Judge Keith's opinion which I am sure is in good faith. I am sure we all say things that are not totally accurate. I think that Judge Keith probably erred in suggesting that arbitration was available when in fact it's not, but that is the way the chips fall.

Thank you for coming in today.

MR. SLAZINSKI: Thank you.

Joint Appendix

Office - Supreme Court, U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. R. GRACE AND COMPANY,
Petitioner,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 14, 1982
CERTIORARI GRANTED JUNE 28, 1982

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RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of Mississippi, Case No. EC 79-200-S-P

9/5/79	Complaint filed
10/22/79	Answer
3/24/80	Defendant's (Local 759) motion for summary judgment
4/16/80	Plaintiff's (W. R. Grace and Company) motion for summary judgment
7/10/80	Hearing on motions for summary judgment; Plaintiff's motion for summary judgment sustained, Defendant's motion for summary judgment overruled
7/21/80	Order granting Plaintiff's motion for summary judgment and denying Defendant's motion for summary judgment
8/12/80	Defendant's notice of appeal
8/15/80	Issuance of ruling of the Court rendered on 7/10/80

United States Court of Appeals for the Fifth Circuit, Case No. 80-3661

8/12/80	Defendant's notice of appeal
8/10/81	Opinion and judgment rendered
8/24/81	Plaintiff/Appellee's petition for rehearing
9/28/81	Order denying petition for rehearing
10/16/81	Judgment issued as mandate

[EEOC DETERMINATION]

[SEAL]

JACKSON DISTRICT OFFICE
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
203 West Capitol Street, Second Floor
Jackson, Mississippi 39201

Oct. 5, 1973

In reply refer to:
Case No. YJA4-112
Charge Nos. TJA3-0473
TJA3-0694

Robert T. Copeland
1404 Ross Street
Corinth, Mississippi 38834

Reginald Betts
1502 Lion Street
Corinth, Mississippi 38834 *Charging Parties*

Southbridge Plastics Division
Corinth, Mississippi 38834 *Respondent*

Determination

Under the authority vested in me by 29 CFR 1601. 19b (d) (September 27, 1972) I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII, and the timeliness and all other jurisdictional requirements have been met.

Respondent plant is located in the industrial section of Corinth, Mississippi. Respondent is a Division of W. R. Grace & Co. of New York, New York and reports to the Hatco group of W. R. Grace & Co. Respondent plant was previously located in Southbridge, Mass. Respondent is

engaged in manufacturing plastic fabrics and other similar material and as of May 7, 1973, employed 690 employees of whom 96, or approximately 14 percent are Black; and approximately 38, or less than six percent are female. Respondent is located in Alcorn County which is 11 percent Black.

Charging Parties allege that Respondent failed to hire them because of their race (Black) and that Respondent maintains segregated job classifications on the basis of race.

It is undisputed that Charging Party Copeland:

a. Had on file with Respondent an application dated August 21, 1972, indicating he desired any type work.

b. Had a High School Degree and 3 years of College training in the area of Chemistry and Mathematics.

c. Had a previous employment history with Respondent of satisfactory work as a Technical Specialist and was acceptable for rehire.

Charging Party Copeland alleges that in August of 1972 while in Corinth for a funeral, he visited Respondent's plant and met with Respondent's former Industrial Relations Manager and because of his previous good work record with Respondent was promised rehire upon relocation. Charging Party further alleges that after relocating, he became Chairman of the Labor Committee of the local N.A.A.C.P. and immediately became involved with local companies with regard to the promoting and upgrading of Black employees in the community and during this time, he made numerous inquiries regarding employment with Respondent and was told on each occasion that they were not hiring at the time. Charging Party was unemployed and thus was forced to live on food stamps.

A Respondent Official states that while he himself was only employed at the Corinth plant since December 4, 1972, he cannot speak for the former Industrial Relations Manager, however, the reason he did not employ Charging Party directly was because he realized Charging Party was over-qualified for hourly work and he did not want to place him in a bargaining situation as an hourly employee because the pay is good and Charging Party might choose to stay and the process of changing hourly employees is difficult. Respondent's Official further states that as soon as an appropriate job became available, Charging Party was placed on it.

While Respondent's workforce is 14 percent Black, an examination of the persons hired by Respondent in 1973 up until the time Charging Party was hired indicates that of the 78 persons hired during this period only six or less than 10 percent were Black. In addition, of the 98 Black employees, 67 or 68 percent are concentrated in five of the lower paid hourly wage categories (calendar windup, color compounder, receiver, print tender and all utility employees). Less then six percent of the White employees are employed in these five categories. Respondent has hired White applicants into the production level with no prior work experience with Respondent and far less qualifications than Charging Party possessed. Respondent also has in the past hired White persons including "over-qualified" White applicants into the production level only to transfer them to the salary level at a later period.

Where similarly placed persons of different races, received dissimilar treatment in the absence of an acceptable explanation, it is reasonable to infer that race was a factor in the dissimilar treatment. See *Commission Decision 71-1683, CCH Employment Practices Guide, P 6262.*

It is undisputed that Charging Party Betts had on file with Respondent an application for employment dated September 26, 1972.

Charging Party Betts alleges that when he applied for employment in September of 1972, he spoke with a personnel official and was told that there were no openings in the office and was asked if he would accept production work to which he responded that he would accept production work and perhaps something better could be worked out at a later time. Charging Party states that he returned to check on his application several times but was always told that there were no openings. Charging Party contends that he has a College Degree in Political Science, work experience as a Counselor with youth and has studied courses in Psychology, Mathematics, French, English and 12 hours of Art. Charging Party further contends that he was not hired by Respondent because of his race (Black).

Respondent denies that charge and states again that he cannot speak for the former Industrial Relations Manager but the reason that he did not hire Charging Party is because he wouldn't know where to put a Political Science major.

The record evidence reveals that 14 percent of Respondent's workforce is Black in a county 11 percent Black, and that Respondent had openings in its workforce since the time of Charging Party's application. Respondent's Officials admit that they have never hired a Black employee into a managerial position, because of a lack of qualified applicants, and that Respondent has hired White applicants into the production level with less qualifications than Charging Party. In addition while Respondent's Official contends that he would not know where to place an applicant who is a Political Science major, Resondent records reveal that in the past Respondent has hired a White applicant who had a semester of college training in Forestry and this same applicant after being employed at the production level was later moved to a salary position of Material Control Clerk.

Where similarly placed persons of different races receive dissimilar treatment in the absence of an acceptable explanation, it is reasonable to infer that race was a factor in the dissimilar treatment. See *Commission Decision 71-1683, CCH Employment Practices Guide, P 6262.*

Charging Parties allege that Respondent maintains segregated job classifications on the basis of race.

Respondent records indicate that it has approximately 90 job classifications, however, only 19 have 10 or more employees. Of those, four have no Black employees, eight contain a very small percent of Black employees and seven have a substantial number of Black employees, indeed five of the seven are majority Black. In addition, there are six job classifications (receivers, print tender, plant servicemen, utility, calendar windup, and color compounder) in which Black persons comprise over 50 percent of the category. Two of these six classifications are designated the lowest labor grade with the exception of trainee or new hires who have no grade listing.

With reference to Respondent's female employment, Respondent employs approximately 40 females from a total of approximately 690 employees. All 40 females are employed in the clerical department.

Title VII permits the use of statistical probability to infer the existence of a pattern or practice of discrimination. Based upon the statistical evidence presented we infer that it was Respondent's policy, at least until the time of this investigation, to segregate some or all of its employment classifications on the basis of race and sex. See *Commission Decision 72-0676, CCH Employment Practices Guide, P 6325.*

Like and related to the instant charges is the matter of Respondent's seniority system with regard to race and sex.

Respondent company recognizes three unions as bargaining agents for its employees. Respondent's labor agree-

ment with the "Over the Road Drivers" does not deal with the subject of seniority. Respondent's contracts with "Local Union No. 759 and the International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America" and the "Machine Printers & Engravers Association of the United States," however, do include paragraphs relating to seniority. Under Respondent's seniority systems, promotions in some categories (i.e. Production Labor Grades 4 thru 7, Maintenance Dept. Classification A, Laboratory Technicians other than Trainees) are based on departmental seniority while some other categories are on a plant wide basis. Lay off and recall (Departmental) and shift preference (plant wide) are other matters influenced by seniority.

Respondent's seniority list reveals the following pattern in reference to the date of hire of its employees:

	Black	White		Black	White
1940-1961	0	8	1969	25	52
1962	3	73	1970	5	17
1963	0	39	1971	20	66
1964	3	40	1972	21	82
1965	1	40	1973	10	63
1966	0	32	Total	81	280
1967	8	75			
1968	2	36			
Total	17	343			

Thus only 17 of the 360 persons on Respondent's seniority list hired between 1940 and 1968 are Black. Prior to 1970, only nine females are listed on Respondent's seniority list of whom all were assigned to clerical type positions. Since those first years, Respondent's records demonstrate that some progress has been made with regard to the number of women hired. From a total of approximately 690 employees, however, it employs only 40 females and none are included in its production jobs. The record reveals that only two of the 40 women are Black females and they were listed as temporary clerks, (al-

though since our investigation they have been put on a permanent basis).

Departmental and plant wide seniority perpetuates past discrimination against White women who prior to 1970 were not employed in significant numbers and who continue to be confined to certain job classifications and against Black males who prior to 1969 were not employed in significant numbers and who continue to be confined to certain job classifications. Since Respondent has not employed Black females in significant numbers in any category, the seniority system will only have a discriminatory impact upon them at some future time. Accordingly I find such seniority systems unlawful. See *Commission Decision 71-1447, CCH Employment Practices Guide, P 6217.*

Like and related to the instant charges is the issue of rejection of employees for promotions on the basis of test results. The Union contract provides for promotion on the maintenance area based upon several factors of which the following language is included: "92) Demonstrated satisfactory performance and progress in assigned classification or work category during each time period as determined by performance reviews and/or passing scores on tests selected by the Company." Observed in one employees file were the following tests: Flanagan Industrial Tests, Scales, Arithmetic, Judgment and Comprehension Form A.

It is well known that pencil and paper tests have a substantially disproportionate impact upon minority group persons. The use of a test which tends to exclude Black persons and other minorities to a greater extent than Whites is proscribed by Title VII unless it is shown that the test is job related and has been validated as a predictor of job performance. Since there is no evidence that such tests have been validated, I find that Respondent is in violation of Title VII by continuing to use such tests.

See *Commission Decision 68-9-327E, CCH Employment Practices Guide, P 6016.*

While Respondent's Officials contend that the only reason Respondent continues to pay membership fees to the local Credit Bureau is to receive such services as the providing of addresses, the file of one applicant's record indicated that a credit clerk had been made as late as January 8, 1973. It should also be noted that Respondent's application form includes space for an applicant's address.

The Commission has previously determined that, since a substantially disproportionate percentage of minority group persons subsist below the poverty level, a policy of excluding persons from employment due to poor credit records has a foreseeable racial effect and thus is unlawful unless shown by Respondent to be required by considerations of business necessity. No such showing has been made and, therefore, I conclude that Respondent's credit check policy is in violation of Title VII. See *Commission Decision 72-0427, CCH Employment Practices Guide, P 6312.*

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled "Notice of Conciliation Process" for the attention of each party. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:

/s/ Evelyn Falkowski
EVELYN FALKOWSKI (MS.)
District Director

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

[EEOC CONCILIATION AGREEMENT]

CONCILIATION AGREEMENT

IN THE MATTER OF:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

ROBERT T. COPELAND

and

REGINALD BETTS,

Charging Parties,

and

SOUTHBRIDGE PLASTICS DIVISION,
W. R. GRACE AND COMPANY
CORINTH, MISSISSIPPI,

Respondent.

Charges having been filed under Title VII of the Civil Rights Act of 1964, as amended, with the U.S. Equal Employment Opportunity Commission, by the Charging Parties against the Respondent, the Charges having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by the Respondent nor a finding of any violation of Title VII of the Civil Rights Act of 1964, as amended, and is entered into voluntarily in order to reaffirm its policy of providing Equal Employment Opportunity for all persons without regard to race, color, religion, sex and national origin.

2. The Charging Parties deem this Agreement to be fair and equitable, and hereby waive, release, and covenant not to sue the Respondent with respect to any matters

which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission, subject to performance by the Respondent of the promises and representations contained herein. The Commission shall determine whether the Respondent has complied with the terms of this Agreement.

3. The Respondent agrees that the Commission, on request of the Charging Parties or on its own motion, may review compliance with this Agreement. As a part of such review, the Commission may require written reports concerning compliance, may inspect the Respondent's premises and operations, examine witnesses, and examine and copy documents.

4. The Respondent agrees that all recruiting, hiring, training, compensation, overtime, job classifications and assignments, working conditions, and privileges of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that all facilities on the premises shall be available for the use of any employee without regard to race, color, religion, or national origin, and that there shall be no discrimination against any employee on said grounds with respect to the use of facilities.

6. The Respondent agrees that the notice required to be posted by Title VII of the Civil Rights Act of 1964, as amended, will be conspicuously posted and kept upon its premises, operations and in all other places where bulletins and notices to employees and applicants for employment are customarily and generally posted and displayed.

7. The Respondent agrees that there shall be no discrimination or retaliation of any kind against any persons because of opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended; or because of the filing of a charge; giving of

testimony or assistance; or participation in any manner in any investigation, proceeding or hearing under Title VII of the Civil Rights Act of 1964, as amended.

8. Respondent agrees to refrain from placing any classified help wanted advertisement under any column-heading or classification that designates either male or female sex.

Respondent further agrees to refrain from specifying either male or female sex in the body of its advertisement.

AFFECTED CLASSES

9. For purposes of this Agreement, the classes affected are designated as persons of the Black race with reference to assignments, promotional criteria, and pre-employment investigations, and persons of the female sex with reference to hiring, assignments, and promotional criteria.

RELIEF FOR CHARGING PARTY COPELAND

10. Respondent represents that Robert Copeland has been continuously employed in its Research and Development Department since April 9, 1974.

11. Respondent agrees to increase Copeland's annual compensation to $9,000.00 per annum, exclusive of overtime compensation.

12. Respondent agrees to consider Copeland for a direct sales position at the Corinth facility at such time as the next sales position becomes available.

13. Respondent agrees that Robert Copeland's date of hire for purposes of all benefits and privileges of employment will be revised to November 1, 1972, and that payments to retirement, savings, and other programs of employee benefits will be made to coincide with that date.

14. Respondent agrees that all reference to the filing of a charge with the Equal Employment Opportunity Commission, or any related matters, will be removed from

Robert Copeland's personnel file, and that no reference of any kind will be made to said charge and/or subsequent proceedings to any employer, referral agency or labor organization.

RELIEF FOR CHARGING PARTY BETTS

15. Respondent agrees to immediately offer Reginald Betts an entry level position in the cost accounting department at the Corinth, Mississippi, facility at the rate of $9,000.00 per annum. Said offer will be made by certified letter, and Betts will respond within ten (10) days of his receipt of the offer.

16. Respondent agrees that all references to the filing of charges with the Equal Employment Opportunity Commission, or any related matters will be removed from Reginald Betts' personnel file, and that no reference of any kind will be made to said charge and/or subsequent proceedings to any employer, referral agency, or labor organization.

17. Respondent agrees that for one (1) year following his date of employment, it will send copies of all adverse personnel actions, warnings, etc., against Reginald Betts to the Commission.

18. Respondent agrees that Betts' date of hire for purposes of all benefits and privileges of employment will be revised to September 26, 1972, and that payment to retirement, savings, and other programs of employee benefits will be made to coincide with that date.

HIRING AND JOB CLASSIFICATIONS

19. Respondent represents that it has stopped use of credit investigations in its pre-employment procedures.

20. Respondent agrees to eliminate any factors which have caused underutilization of Black males in its administrative, clerical, laboratory, and upper grade produc-

tion positions; Black females in all except clerical; and White females in all positions except clerical and office white collar. Respondent further agrees that any policies developed with respect to hiring and placement of persons in the referenced classifications and categories will be carefully designed so as not to have a disproportionate adverse impact on the affected classes.

21. Respondent agrees to continue to affirmatively recruit, hire, assign, transfer, upgrade and promote persons of the affected classes until:

A. Black males are utilized in all classifications, departments, and job categories.

B. Black females are utilized in office white collar, executive, and laboratory categories, departments and classifications.

C. Females of both Black and White races are utilized in significant numbers in all production, maintenance, laboratory, printing and other departments and classifications in which they can be employed.

TESTING

22. Respondent agrees that it has stopped or will stop the use of all tests which have a disparate rejection impact on any affected classes and which have not been validated according to Commission guidelines.

23. Respondent agrees that no tests will be implemented in employee selection procedures until they have been properly validated.

24. Respondent agrees that all previous unvalidated test results will be eliminated from its files pertaining to members of the affected classes, and that those persons, if any, will be reconsidered for positions from which they were barred by said testing.

SENIORITY

25. The Respondent agrees that notwithstanding any provision(s) of any collective bargaining agreement to which it is a party at its Corinth facility, including a contract with the International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America and its Local Union Number 759, that the Respondent will adhere to the following:

A. No female employee, whether employed at the present time or hired at a future date, will be removed from her job or her shift by a male employee by utilization of the shift preference provisions of any collective bargaining agreement in effect at the Corinth facility.

B. In the event that it becomes necessary for the Respondent to lay off employees who are covered by any collective bargaining agreement in effect at the Corinth facility and said layoff will result in females being laid off if the applicable provisions of the collective bargaining agreement were utilized in a greater percentage than they constitute of the bargaining unit, the following procedure will be utilized:

(1) Female employees will be laid off in direct proportion to the percentage which they make up of a bargaining unit covered by collective bargaining agreement. For example: If a bargaining agreement has four-hundred (400) members of which three-hundred (300) are male and one-hundred females (100) who have lesser plant seniority than the males, and the Respondent decides to lay off one-hundred (100) employees, then since females constitute twenty-five percent (25%) of the bargaining

unit, twenty-five (25) females in order of their seniority will be laid off.

(2) In no event will any female employee be laid off by utilization of the foregoing procedure if she would not have been laid off if the applicable contract provisions were utilized. For example, if the Respondent were to lay off one hundred (100) employees in accordance with the terms of the applicable collective bargaining agreement and only ten (10) females would be laid off, then only ten (10) females will be laid off.

C. In the event that a female employee shall voluntarily exercise shift preference, she shall be subject to the shift preference provisions of the applicable collective bargaining agreement in the same manner as male employees.

D. Numbered item 25 of this Agreement will expire on March 20, 1977, unless renewed by agreement of the Respondent and the Equal Employment Opportunity Commission. Not less than thirty (30) days prior to March 20, 1977, the Respondent and a designated representative of the Equal Employment Opportunity Commission must meet to determine whether numbered item 25 of this Agreement will be renewed for a term of months or years to be agreed upon.

PREGNANCY LEAVE

26. Respondent agrees that pregnancy leave and benefits for all female employees will be granted in the same manner as leave for any other temporary disability. Copies of the Respondent's leave policies will be provided to the Equal Employment Opportunity Commission upon request.

REPORTING

27. Respondent agrees to report as follows to:

District Director
Jackson District Office
Equal Employment Opportunity Commission
203 West Capitol, Room 501
Jackson Mississippi 39201

A. Information or actions agreed to in Provisions 15, 17, 21, 22, 23, and 25 above.

B. Every nine (9) months for a period of three (3) years the Respondent will statistically report by race and sex its hires, upgrading, promotions, and a statistical analysis of its total work force.

[RELEVANT PROVISIONS OF 1974 COLLECTIVE BARGAINING AGREEMENT BETWEEN LOCAL 759 AND SOUTHBRIDGE PLASTICS DIVISION, W. R. GRACE AND COMPANY]

ARTICLE IV

PROCEDURE FOR

HANDLING GRIEVANCES

1. For the purpose of this Agreement, a grievance is defined as a difference of opinion between the Company and the Union, or between the Company and an employee covered by this Agreement, with respect to the meaning and application of the terms of this Agreement.

a. FIRST STEP:

Any employee who has a grievance shall within four (4) working days after the occurrence of the matter complained of submit his grievance in writing to either his foreman or the department manager. This shall be done in person or through his department steward. Upon submission of the written grievance, a conference will be held in the office of the foreman or department manager for the purpose of discussing said grievance. Such meeting will be held between the grievant, his department steward, the foreman, and the department manager. The foreman or department manager shall provide a written answer to the grievance within three (3) working days after the meeting. Should the first step answer be unsatisfactory, the Union may appeal the grievance in writing to the next step within three (3) working days after receipt of the Company's answer or the matter will be considered to be settled.

b. SECOND STEP:

(1) If the grievance is not settled in Step 1, then such grievance shall be taken up between the Company and

Union at their regular bi-monthly grievance meeting. The Company must submit its answer within five (5) working days after the close of the second step meeting. If the grievance is not resolved, then the Union shall have ten (10) days in which to appeal, in writing, the grievance to arbitration.

(2) Joint meetings shall be held by the Company and Union on the second and fourth Wednesday, and Friday, if necessary, of each month beginning at 1:00 p.m. at a mutually agreeable location. Special meetings may be held upon notification of either party of their desire to meet as soon as it is reasonably possible.

2. SELECTION OF ARBITRATOR:

a. The parties agree to select an impartial Arbitrator from a permanent Arbitrators' panel which will be composed of seven (7) Arbitrators selected by mutual agreement and made a part of this Agreement.

b. When an Arbitrator is required from the permanent Arbitrators' panel the parties may either select the Arbitrator by mutual agreement or by alternately striking names from the permanent Arbitrators' panel until one name remains who will be designated as the Arbitrator. The right to strike the first name will be decided by the flip of a coin. Should the Arbitrator first selected be unable to hear the grievances then another Arbitrator shall be selected in the manner prescribed above.

3. ARBITRATOR'S AUTHORITY:

The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement.

4. ARBITRATOR'S DECISION:

The Arbitrator's decision shall be made within thirty (30) days after the dispute has been heard unless additional time is requested by the Arbitrator and mutually agreed upon by the Company and the Union. The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company. The decision of the Arbitrator shall be complied with within ten (10) days after receipt of the decision, unless additional time is requested and approved.

5. ARBITRATOR'S EXPENSE:

The expense and remuneration of the Arbitrator shall be borne equally by the Company and Union. The Company shall not be responsible for the wages or expenses of any individual acting as agent for, or witness in behalf of, the Union in any dispute carried beyond the Third Step of the Grievance Procedure.

6. SPECIAL PROCEDURE FOR HANDLING DISCHARGES:

a. No employee, other than a probationary employee, shall be discharged without first being suspended from work with view of discharge. The suspended employee shall leave the plant immediately upon his suspension. The Company shall give prompt notice of its action to the Union and any dispute about the existence of just cause shall promptly be presented to the Industrial Relations Director.

b. If the dispute cannot be settled informally it may be submited as a grievance directly at the third step of the grievance procedure. The grievance must be filed by either the employee or the Union within five (5) regular work days from the date of notice to the Union of the Company's final action.

7. GENERAL PROVISIONS:

a. If it is determined in the grievance procedure that an employee has been unjustly discharged or suspended the employee shall be reinstated to his former job and shall be compensated at his regular hourly earnings for the time lost less any penalty time decided upon.

b. The time limits as set forth in the grievance procedure may be extended by mutual agreement of both parties.

c. In the event that it becomes necessary for a Union representative to leave his place of work for the purpose of investigating a grievance in a department or departments over which he has jurisdiction, or to attend to Union business, he will report to his foreman and advise him of his destination. In the event that the representative is on a job that affects the production of an employee or group of employees, the foreman shall make the necessary arrangements to relieve the representative. The representative will remain on the job until such arrangements can be made, provided same are made within a reasonable time. He shall report to his foreman immediately upon his return.

d. All time lost from work by Union Representatives investigating or handling grievances shall be paid for by the Company at the employee's regular hourly rate.

e. Upon request of the Union an International Representative will be permitted to participate in negotiations and arbitration commencing at the step between the Union and the Company's Plant Manager and Personnel Department; and the Company or Union may be represented by such parties as it selects, including counsel.

f. No investigating or processing of grievances shall take place during overtime hours, except with respect to an act occurring during the overtime in which the investigating or processing is done.

ARTICLE VIII

SENIORITY

Section 1—Definition and Purpose

1. Seniority is preference or priority measured by length of service with definite rights qualifying for employment when work is available the purpose of which is to provide a declared policy of work security measured by length of service subject to the limitations set out in this Agreement.

2. New employees shall have no seniority rights until they have completed a probationary period of thirty (30) working days, after which their seniority shall extend back to date of hire. The Company shall have the right to layoff, terminate or discharge the service of new employees at its discretion without recourse.

3. Time off the payroll shall be counted as continuous service without deduction of time lost when an employee is either sick or injured, on leave of absence in accordance with this Agreement, laid off, serving in the Armed Forces, or while on leave of absence prior thereto.

Section 2—Promotions

1. Whenever a new job is created, or a vacancy occurs on an established job, the Company shall post a notice on a designated bulletin board for bids as follows:

a. Vacancies occurring in Production Labor Grades 4 through 7, Maintenance Department Classifications A, Laboratory Technicians other than trainees: The notice shall be initially posted in the Department where the vacancy occurs.

b. All other vacancies: The notice shall be initially posted on a designated central bulletin board for plant wide bids.

The notice shall contain a description of the job and the hourly rate of such job. The notice shall remain posted on the bulletin board for a period of twenty-four (24) hours.

2. When such jobs are posted employees wishing to make application shall sign the notice. Employee's whose names remain on the notice at the end of the official posting period shall be considered for the job and, should they be the successful bidder, must accept the job.

3. After the posting has elapsed the opening shall be awarded to the employee making application with the greatest amount of seniority who can qualify.

4. The successful bidders in accordance with paragraph three (3) of this Section shall be transferred to such opening not later than the beginning of the pay period next following end of the posting period or as soon thereafter as possible, except for jobs requiring long or special training.

5. A successful bidder chosen in accordance with paragraph three (3) above shall be regarded as on trial for a period of thirty (30) days, normally, but not to exceed sixty (60) days. Upon failure of the employee to satisfactorily complete the trial period, he shall be returned to his former job unless agreed otherwise between the Company and the Union. Vacancies created by this clause shall be posted for bid again.

6. Job vacancies created by employees bidding on jobs must not exceed two (2) plant wide postings in any one chain. Any vacancy created after two (2) plant wide bids are allowed shall be filled from any source including new hires.

7. Whenever an employee is a successful bidder for a job, he shall not be allowed to bid on another job for six (6) months thereafter, except he may bid on jobs in higher labor grades in his assigned department.

8. A successful bidder for a job in another department shall not be allowed to bid on another job for six (6)

months, except he may bid on new jobs being created or added to his assigned department without regard to the six (6) month restriction.

Section 3—Shift Preference

1. Employees working on the same job shall be given preference in accordance with their plant wide seniority except for training and temporary periods.

2. An employee may exercise his shift preference within this established job; however, if he does not have seniority within his established job on the shift of his choice, he may bump downward to a job in a lower labor grade within his assigned department, in order to obtain the shift of his preference. An employee exercising shift preference to a job in a lower labor grade under this provision, however, must remain on his assigned job until such time as a suitable replacement is obtained and properly trained to take his place.

3. Employees exercising shift preference shall remain on their selected shift for a six (6) month period. This shall not prevent the changing of shifts between employees by mutual agreement, so long as the foremen of the shifts approve.

4. All new employees shall be placed on their respective shifts as soon as they can perform the job without assistance or within thirty (30) days from hiring date.

Section 4—Layoffs and Recalls

1. Whenever a reduction in the work force is necessary, the Company will notify the affected employees at least three (3) working days before the layoffs are to become effective, or grant three (3) days pay in lieu thereof at the employee's regular hourly rate of pay. This paragraph shall not apply to layoffs of seven (7) calendar days or less, in which case no notice will be required and no layoff pay shall be involved: however, the Company agrees to use its best effort to give advance notice to employees of layoffs of seven (7) calendar days or less; such notice

will be posting, or verbal, within the discretion of the Company. Notice of layoffs of more than seven (7) calendar days shall be by posting.

2. In the event of a reduction in the work force, employees will bump downward by classification in line with seniority and qualifications within their department.

3. If no job openings are available within the department, employees will replace employees with less seniority in an equal or lower classification, if qualified, and will be placed on their shift of preference. The affected employees will be laid off in accordance with their plant wide seniority, the youngest employee in point of service shall be laid off first. The placing of employees on openings created by laying off the least senior employees will be by seniority when the employee is qualified to perform the job.

a. Certain jobs require extra long or special training. The Company need not transfer to or lay off from such jobs, any employee, except in those cases where the transferee has previously qualified for such job. These jobs are Maintenance A jobs, Production jobs in Labor Grades 6, 7, Design/Dev. Operators, Pre-Mix Operators; Laboratory Technicians at Maximum rate.

4. When increasing the work force in the plant, the Company shall recall employees as follows:

a. An employee forced off his job due to a previous reduction in force and working on another job in the plant shall be returned to any opening which may occur on his former job in accordance with his plant wide seniority.

b. The Company shall then recall employees on layoff in accordance with their plant wide seniority and place them on available jobs at the discretion of the Company except when there are two (2) or more jobs available in which case preference will be given to the

senior employee. An employee called back to work shall work on the job to which he is called back to until such time as the job which he originally held before the layoff is put back into operation at which time he shall be returned to his original job.

5. Notice of recall shall be sent by registered mail, return receipt requested, to the employee's last address listed in the Company's files. The employee shall have three (3) days after receipt of notice of recall, or after the date which a notice of recall was delivered to last address, whichever is the shorter period, in which to notify the Company of intent to return to work, and if the employee is not employed at the time of recall he shall return to work within the period indicated, but if he is employed at the time of recall he shall have ten (10) days after receipt of notice of recall, or after the date which a notice of recall, sent by registered mail, was delivered to his last address, to return to work.

6. Employees shall be recalled as herein provided for, with the understanding, however, that in cases of layoffs and recalls the Company may disregard seniority, if it is necessary to fill a particular job which, if left open, would curtail or prevent the employment of other employees.

7. Employees shall be paid the regular rate of the job to which they are transferred to or called back to under the provisions of this Agreement.

8. The Company shall be the sole judge in determining when to increase the work force in the plant and the number of employees to recall from layoff.

Section 5—Transfers

1. An employee permanently transferred from one job to another, including jobs in different departments shall receive the pay of the job to which he was transferred.

Section 6—Leaves of Absence

1. Any employee covered by this Agreement who leaves the employment of the Company to enter the Armed

Forces by draft under the Selective Service and Training Act, or any other similar Federal legislation which may be passed, shall be granted a leave covering such absence. The Company will comply with all applicable laws relating to the reinstatement of such employees. The Company and the Union shall comply in all respects with the laws applicable to Military Training Service and re-employment.

a. Employees who are members of the National Guard or Reserve components of the U. S. Armed Forces shall be granted an automatic leave of absence to participate in scheduled training periods as outlined under Federal and State Laws. Such leave shall not be counted as days of absence from employment in determining entitlement to vacation pay, holiday pay or any other benefit under the provisions of this contract.

2. An employee who becomes ill or is injured and whose claim of illness or injury is supported by satisfactory evidence shall be granted a leave of absence not to exceed three (3) years to cover the period of such illness. Seniority shall accumulate during period of such leave.

3. An employee seeking election for or elected to any public office in City, County, State or Federal Government shall be granted a leave of absence as required for campaigning up to ninety (90) days, or for his tenure in office. Seniority shall accumulate during period of such leave.

4. An employee elected or selected for duty as an officer, representative or employee of the Local Union or the International Union, the AFL-CIO as such, or for any State, County, City or any Local Union Council of the AFL-CIO, which assignment will take him from his employment with the Company, shall upon written request of the Union or International Union receive a leave of absence. Seniority shall accumulate during such leave of absence.

5. An employee wishing a leave of absence for a period of more than two (2) weeks shall make application to the Industrial Relations Department, where it will be considered on its merits and the Company's ability to grant said leave. If granted, such leave shall be in writing and a copy furnished the Union. A leave of absence will normally not exceed thirty (30) days and under no circumstances ninety (90) days. A leave of absence will not be granted for self-employment, or employment elsewhere. A person on leave must return by the expiration date of the leave and upon reinstatement shall, consistent with his seniority, be placed on his previous or comparable work.

6. An employee upon written request shall be granted a leave of absence for pregnancy consistent with all Federal and State laws and regulations. Seniority shall accumulate during such leave of absence.

7. An employee accepting a position outside the bargaining unit shall continue to accumulate seniority. If he is returned to the bargaining unit by mutual approval of the Union and the Company, he shall be placed on a job vacancy consistent with his seniority. If no vacancy exists, he shall replace the employee with the least seniority, if he has more seniority: the seniority referred to being on a plant wide basis.

Section 7—Termination of Seniority

1. Employee's seniority shall terminate:

a. Upon discharge for cause.

b. Upon voluntary termination of employment (quit).

c. Upon failure to return to work following layoff within the time provided therefor as specified in Article VIII, Section 4, paragraph 5 hereof.

d. Absence from work for three (3) consecutive days without a reasonable excuse. The burden of proof rests with the employee.

e. Upon failure to return to work within ten (10) days after expiration of a leave of absence.

f. By engaging in gainful occupation while on leave of absence, unless leave was granted for such purpose.

g. Upon layoff for a period in excess of two (2) years.

* * * *

ARTICLE XIII

NON-DISCRIMINATION

1. Both the Company and the Union agree that they will not discriminate against any employee because of sex, race, color, creed, age, nationality or religious beliefs and that both parties will abide by and comply with all applicable Federal Laws banning discrimination in regard to hire, promotions and job assignments. It is understood that the application of this Article and this Section applies specifically to such discrimination due to an employee's sex, race, color, creed, age, nationality or religious beliefs.

* * * *

ARTICLE XIV

GENERAL PROVISIONS

* * * *

7. In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

* * * *

[RELEVANT PROVISIONS OF 1977 COLLECTIVE BARGAINING AGREEMENT BETWEEN LOCAL 759 AND SOUTHBRIDGE PLASTICS DIVISION, W. R. GRACE AND COMPANY]

ARTICLE IV

PROCEDURE FOR HANDLING GRIEVANCES

1. For the purpose of this Agreement, a grievance is defined as a difference of opinion between the Company and the Union, or between the Company and an employee covered by this Agreement, with respect to the meaning and application of the terms of this Agreement.

a. FIRST STEP:

Any employee who has a grievance shall within four (4) working days after the occurrence of the matter complained of submit his grievance in writing to either his foreman or the department manager. This shall be done in person or through his department steward. Upon submission of the written grievance, a conference will be held in the office of the foreman or department manager for the purpose of discussing said grievance. Such meeting will be held between the grievant, his department steward, the foreman, and the department manager. The foreman or department manager shall provide a written answer to the grievance within three (3) working days after the meeting. Should the first step answer be unsatisfactory, the Union may appeal the grievance in writing to the next step within three (3) working days after receipt of the Company's answer or the matter will be considered to be settled.

b. SECOND STEP:

(1) If the grievance is not settled in Step 1, then such grievance shall be taken up between the Company and Union at their regular bi-monthly grievance meeting. The Company must submit its answer within five (5) working days after the close of the second step meeting. If the

grievance is not resolved, then the Union shall have ten (10) days in which to appeal, in writing, the grievance to arbitration.

2) Joint meetings shall be held by the Company and Union on the second and fourth Wednesday, and Friday, if necessary, of each month beginning at 1:00 p.m. at a mutually agreeable location. Special meetings may be held upon notification of either party of their desire to meet as soon as it is reasonably possible.

2. SELECTION OF ARBITRATOR:

a. The parties agree to select an impartial Arbitrator from a permanent Arbitrators' panel which will be composed of seven (7) Arbitrators selected by mutual agreement and made a part of this Agreement.

b. When an Arbitrator is required from the permanent Arbitrators' panel the parties may either select the Arbitrator by mutual agreement or by alternately striking names from the permanent Arbitrators' panel until one name remains who will be designated as the Arbitrator. The right to strike the first name will be decided by a flip of a coin. Should the Arbitrator first selected be unable to hear the grievances than another Arbitrator shall be selected in the manner prescribed above.

3. ARBITRATOR'S AUTHORITY

The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue, between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement.

4. ARBITRATOR'S DECISION:

The Arbitrator's decision shall be made within thirty (30) days after the dispute has been heard unless addi-

tional time is requested by the Arbitrator and mutually agreed upon by the Company and the Union. The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company. The decision of the Arbitrator shall be complied with within ten (10) days after receipt of the decision unless additional time is requested and approved.

5. ARBITRATOR'S EXPENSE:

The expense and remuneration of the Arbitrator shall be borne equally by the Company and Union. The Company shall not be responsible for the wages or expenses of any individual acting as agent for, or witness in behalf of, the Union in any dispute carried beyond the Third Step of the Grievance Procedure.

6. SPECIAL PROCEDURE FOR HANDLING DISCHARGES:

a. No employee, other than a probationary employee, shall be discharged without first being suspended from work with view of discharge. The suspended employee shall leave the plant immediately upon his suspension. The Company shall give prompt notice of its action to the Union and any dispute about the existence of just cause shall promptly be presented to the Industrial Relations Director.

b. If the dispute cannot be settled informally it may be submitted as a grievance directly at the third step of the grievance procedure. The grievance must be filed by either the employee or the Union within five (5) regular work days from the date of notice to the Union of the Company's final action.

7. GENERAL PROVISIONS:

a. If it is determined in the grievance procedure that an employee has been unjustly discharged or suspended

the employee shall be reinstated to his former job and shall be compensated at his regular hourly earnings for the time lost less any penalty time decided upon.

b. The time limits as set forth in the grievance procedure may be extended by mutual agreement of both parties.

c. In the event that it becomes necessary for a Union representative to leave his place of work for the purpose of investigating a grievance in a department or departments over which he has jurisdiction, or to attend to Union business, he will report to his foreman and advise him of his destination. In the event that the representative is on a job that affects the production of an employee or group of employees, the foreman shall make the necessary arrangements to relieve the representative. The representative will remain on the job until such arrangements can be made, provided same are made within a reasonable time. He shall report to his foreman immediately upon his return.

d. All time lost from work by Union Representatives investigating or handling grievances shall be paid for by the Company at the employee's regular hourly rate.

e. Upon request of the Union an International Representative will be permitted to participate in negotiations and arbitration commencing at the step between the Union and the Company Plant Manager and Personnel Department; and the Company or Union may be represented by such parties as it selects, including counsel.

f. No investigating or processing of grievances shall take place during overtime hours, except with respect to an act occurring during the overtime in which the investigating or processing is done.

* * * *

ARTICLE VIII

SENIORITY

Section 1—Definition and Purpose

1. Seniority is preference or priority measured by length of service with definite rights qualifying for employment when work is available, the purpose of which is to provide a declared policy of work security measured by length of service subject to the limitations set out in this Agreement.

2. New employees shall have no seniority rights until they have completed a probationary period of thirty (30) working days, after which their seniority shall extend back to date of hire. The Company shall have the right to layoff, terminate or discharge the service of new employees at its discretion without recourse.

3. Time off the payroll shall be counted as continuous service without deduction of time lost when an employee is either sick or injured, on leave of absence in accordance with this Agreement, laid off, serving in the Armed Forces, or while on leave of absence prior thereto.

Section 2—Promotions

1. Whenever a new job is created, or a vacancy occurs on an established job, the Company shall post a notice on a designated bulletin board for bids as follows:

a. Vacancie occurring in Production Labor Grades 4 through 7, Maintenance Department Classifications A, Laboratory Technicians other than trainees: The notice shall be initially posted in the Department where the vacancy occurs.

b. All other vacancies: The notice shall be initially posted on a designated central bulletin board for plant wide bids.

The notice shall contain a description of the job and the hourly rate of such job. The notice shall remain posted on the bulletin board for a period of twenty-four (24) hours.

2. When such jobs are posted employees wishing to make application shall sign the notice. Employee's whose names remain on the notice at the end of the official posting period shall be considered for the job and, should they be the successful bidder, must accept the job.

3. After the posting has elapsed the opening shall be awarded to the employee making application with the greatest amount of seniority who can qualify.

4. The successful bidders in accordance with paragraph three (3) of this Section shall be transferred to such opening not later than the beginning of the pay period next following end of the posting period or as soon thereafter as possible, except for jobs requiring long or special training.

5. A successful bidder chosen in accordance with paragraph three (3) above shall be regarded as on trial for a period of thirty (30) days, normally, but not to exceed sixty (60) days. Upon failure of the employee to satisfactorily complete the trial period, he shall be returned to his former job unless agreed otherwise between the Company and the Union. Vacancies created by this clause shall be posted for bid again.

6. Job vacancies created by employees bidding on jobs must not exceed two (2) plant wide postings in any one chain. Any vacancy created after two (2) plant wide bids are allowed shall be filled from any source including new hires.

7. Whenever an employee is a successful bidder for a job, he shall not be allowed to bid on another job for six (6) months thereafter, except he may bid on jobs in higher labor grades in his assigned department.

8. A successful bidder for a job in another department shall not be allowed to bid on another job for six (6) months, except he may bid on new jobs being created or added to this assigned department without regard to the six (6) month restriction.

Section 3—Shift Preference

1. Employees working on the same job shall be given preference in accordance with their plant wide seniority except for training and temporary periods.

2. An employee may exercise his shift preference within his established job; however, if he does not have seniority within his established job on the shift of his choice, he may bump downward to a job in a lower labor grade within his assigned department, in order to obtain the shift of his preference. An employee exercising shift preference to a job in a lower labor grade under this provision, however, must remain on his assigned job until such time as a suitable replacement is obtained and properly trained to take his place.

3. Employees exercising shift preference shall remain on their selected shift for a six (6) month period. This shall not prevent the changing of shifts between employees by mutual agreement, so long as the foremen of the shifts approve.

4. All new employees shall be placed on their respective shifts as soon as they can perform the job without assistance or within thirty (30) days from hiring date.

Section 4—Layoffs and Recalls

1. Whenever a reduction in the work force is necessary, the Company will notify the affected employees at least three (3) working days before the layoffs are to become effective, or grant three (3) days pay in lieu thereof at the employee's regular hourly rate of pay. This paragraph shall not apply to layoffs of seven (7) calendar days or

less, in which case no notice will be required and no layoff pay shall be involved; however, the Company agrees to use its best effort to give advance notice to employees of layoffs of seven (7) calendar days or less; such notice will be posting, or verbal, within the discretion of the Company. Notice of layoffs of more than seven (7) calendar days shall be by posting.

2. In the event of a reduction in the work force in a department, employees who can qualify will bump less senior employees within the department in all labor grades except those excluded in Section IV, paragraph 3(a), and may bump those employees in the excluded jobs in paragraph (a), if qualified.

3. Any openings which exist in labor grades 1, 2, 3, 4, or 5 will be filled by employees who can qualify based on seniority and preference. If no job openings are available within other departments, employees who can qualify will replace employees in other work classifications in labor grades 1, 2, 3, 4, or 5 based on seniority and preference, and may bump less senior employees in jobs listed in paragraph (a) if qualified. The affected employees will be laid off in accordance with their plant wide seniority, the youngest employee in point of service shall be laid off first.

a. Certain jobs require long or special training. The Company need not transfer to or layoff from such jobs, any employee, except in those cases where the transferee has previously qualified for such job. These jobs are Maintenance A jobs, Production jobs in Labor Grades 6, 7, Design/Development Operators, Color-Weigher, Pre-Mix Operators; Laboratory Technicians at Maximum rate. An employee can bump a junior employee in the above jobs if qualified.

4. When increasing the work force in the plant, the Company shall recall employees as follows:

a. An employee forced off his job due to a previous reduction in force and working on another job in the

plant shall be returned to any opening which may occur in his former department in labor grades 1, 2, 3, 4, or 5 who can qualify in accordance with plant wide seniority.

b. The Company shall then recall employees who can qualify in accordance with their plant wide seniority based on his preference for jobs in labor grades 1, 2, 3, 4, or 5, and qualifications in jobs listed in Section 4, paragraph 3(a). In order to exercise preference an employee must present himself in the Personnel Department no later than as scheduled on the last working day prior to the recall. Any employee may exercise other provisions of this contract as provided for to change from the job he is on after recall; however, by voluntarily changing jobs such employees shall lose recall rights to his original department.

5. Notice of recall shall be sent by certified mail, return receipt requested, to the employee's last address listed in the Company's files. The employee shall have three (3) days after receipt of notice of recall, or after the date which a notice of recall was delivered to last address, whichever is the shorter period, in which to notify the Company of intent to return to work, and if the employee is not employed at the time of recall he shall return to work within the period indicated, but if he is employed at the time of recall he shall have ten (10) days after receipt of notice of recall, or after the date which a notice of recall, sent by registered mail, was delivered to his last address, to return to work.

6. Employees shall be recalled as herein provided for, with the understanding, however, that in cases of layoffs and recalls the Company may disregard seniority, if it is necessary to fill a particular job which, if left open, would curtail or prevent the employment of other employees.

7. Employees shall be paid the regular rate of the job to which they are transferred to or called back to under the provisions of this Agreement.

8. The Company shall be the sole judge in determining when to increase the work force in the plant and the number of employees to recall from layoff.

9. Temporary Layoff

This provision is intended to be used to cover short term emergency or unusual situation such as major equipment breakdown, material shortages, Acts of God and short cycles scheduling imbalances due to customer demand.

When a short term work force reduction is required affecting either part or all of a department(s) the following will apply:

Temporary Layoff of No More Than Four (4) Weeks

Any jobs that remain in the department will be filled based on qualifications and seniority for jobs listed in Section 4, paragraph 3(a) and seniority and who can qualify for all other jobs. Employees required to leave the department will displace the least senior plant employees and will have preference of jobs available based on qualifications and seniority.

When the plant is operating under a short work week situation and it becomes necessary to complete the week for any department the employees in that department will be scheduled.

Section 5—Transfers

1. An employee permanently transferred from one job to another, including jobs in different departments shall receive the pay of the job to which he was transferred.

Section 6—Leaves of Absence

1. Any employee covered by this Agreement who leaves the employment of the Company to enter the Armed Forces by draft under the Selective Service and Training Act, or any other similar Federal legislation which may be passed, shall be granted a leave covering such absence. The Company will comply with all applicable laws relat-

ing to the reinstatement of such employees. The Company and the Union shall comply in all respects with the laws applicable to Military Training Service and re-employment.

a. Employees who are members of the National Guard or Reserve components of the U.S. Armed Forces shall be granted automatic leave of absence to participate in scheduled training periods as outlined under Federal and State Laws. Such leave shall not be counted as days of absence from employment in determining entitlement to vacation pay, holiday pay or any other benefit under the provisions of this contract.

2. An employee who becomes ill or is injured and whose claim of illness or injury is supported by satisfactory evidence shall be granted a leave of absence not to exceed three (3) years to cover the period of such illness. Seniority shall accumulate during period of such leave.

3. An employee seeking election for or elected to any public office in City, County, State or Federal Government shall be granted a leave of absence as required for campaigning up to ninety (90) days, or for his tenure in office. Seniority shall accumulate during period of such leave.

4. An employee elected or selected for duty as an officer, representative or employee of the Local Union or the International Union, the AFL-CIO as such, or for any State, County, City or any Local Union Council of the AFL-CIO, which assignment will take him from his employment with the Company, shall upon written request of the Union or International Union receive a leave of absence. Seniority shall accumulate during such leave of absence.

5. An employee wishing a leave of absence for a period of more than two (2) weeks shall make application to the Industrial Relations Department, where it will be considered on its merits and the Company's ability to grant said leave. If granted, such leave shall be in writing and a

copy furnished the Union. A leave of absence will normally not exceed thirty (30) days and under no circumstances ninety (90) days. A leave of absence will not be granted for self-employment, or employment elsewhere. A person on leave must return by the expiration date of the leave and upon reinstatement shall, consistent with his seniority, be placed on his previous or comparable work.

6. An employee upon written request shall be granted a leave of absence for pregnancy consistent with all Federal and State laws and regulations. Seniority shall accumulate during such leave of absence.

7. An employee accepting a position outside the bargaining unit shall continue to accumulate seniority. If he is returned to the bargaining unit by mutual approval of the Union and the Company, he shall be placed on a job vacancy consistent with his seniority. If no vacancy exists, he shall replace the employee with the least seniority, if he has more seniority; the seniority referred to being on a plant wide basis.

Section 7—Termination of Seniority

1. Employees' seniority shall terminate:

a. Upon discharge for cause.

b. Upon voluntary termination of employment (quit).

c. Upon failure to return to work following layoff within the time provided therefor as specified in Article VIII, Section 4, paragraph 5 hereof.

d. Absence from work for three (3) consecutive days without a reasonable excuse. The burden of proof rests with the employee.

e. Upon failure to return to work within ten (10) days after expiration of a leave of absence.

f. By engaging in gainful occupation while on leave of absence, unless leave was granted for such purpose.

g. Upon layoff for a period in excess of two (2) years.

• • • •

ARTICLE XIII

NON-DISCRIMINATION

1. Both the Company and the Union agree that they will not discriminate against any employee because of sex, race, color, creed, age, nationality or religious beliefs and that both parties will abide by and comply with all applicable Federal Laws banning discrimination in regard to hire, promotions and job assignments. It is understood that the application of this Article and this Section applies specifically to such discrimination due to an employee's sex, race, color, creed, age, nationality or religious beliefs.

• • • •

ARTICLE XIV

GENERAL PROVISIONS

• • • •

7. In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

• • • •

[1975 ORDER OF THE DISTRICT COURT IN *SOUTHBRIDGE PLASTICS DIV., W. R. GRACE AND COMPANY v. LOCAL 759 AND EEOC*]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 74-90-S

SOUTHBRIDGE PLASTICS DIVISION,
W.R. GRACE & COMPANY,
Plaintiff

v.

LOCAL 759, INTERNATIONAL UNION OF THE
UNITED RUBBER, CORK, LINOLEUM AND
PLASTIC WORKERS OF AMERICA AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants

ORDER

Defendant, Local 759, having moved to dismiss the cross-claim of defendant, Equal Employment Opportunity Commission (hereinafter EEOC), and defendant, EEOC, having moved for summary judgment on its cross and counterclaim on the ground that there is no genuine issue as to any material fact and that the defendant, EEOC, is entitled to judgment as a matter of law.

Now on considering the pleadings and exhibits submitted by the parties; and after hearing counsel for the respective parties, and due deliberation having been had, it is, for the reasons cited in my decision of November 3, 1975,

ORDERED, that defendant's, Local 759, motion to dismiss be and the same hereby is denied, and, for the reasons specified in my decision of November 3, 1975, it is further

ORDERED, that defendant's, EEOC, motions for summary judgment be and the same hereby are granted, and that summary judgment be entered herein in favor of the defendant, EEOC.

IT IS FURTHER ORDERED THAT:

(1) The terms of the conciliation agreement executed on December 11, 1974, by the plaintiff and the defendant, EEOC, are binding upon all the parties to this action; and

(2) Where the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759, conflict with the provisions of the conciliation agreement executed by the plaintiff and defendant, EEOC, the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby.

IT IS FURTHER ORDERED that the court shall retain jurisdiction of this matter until March 20, 1977, and that the costs of these proceedings be assessed against the defendant, Local 759.

This 26th day of November, 1975.

/s/ Orma R. Smith
United States District Judge

[SABELLA ARBITRATION AWARD]

IN THE MATTER OF ARBITRATION BETWEEN

Grievance No. 78-7

HATCO PLASTICS DIVISION/
W. R. GRACE AND COMPANY,
Employer

and

LOCAL UNION 759, THE INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Union

OPINION AND AWARD

The hearing was held 8/16/78 in Corinth, MS before the undersigned duly selected by the parties.

The following appearances were noted: Terry Cole, Director Human Resources for the Employer; Larry S. Bridges, Local President for the Union.

The parties were afforded full opportunity to present any and all evidence on their behalf. Based on the entire record, including stipulations of fact and argument of the parties, the following is found.

The grievance dated 3/3/78 by Albert L. Jowers complains that he was improperly laid off as a laminating operator and a female junior employee retained. Grievant requests reinstatement to his job and to be made whole.

An understanding of the grievance requires an explanation of the context in which it arose.

In 1972, a charge of racial discrimination was made by an individual who had applied for employment in a non-unit job. In the course of the investigation the EEOC determined that there had been sex discrimination because not until 1974 were females employed.

In 1974 the EEOC and the Employer entered into a conciliation agreement. The Union was invited to join in but declined.

A key provision of the conciliation agreement suspended, in effect, the seniority provision re layoffs, etc. as it applied to females in order to remedy the effects of past discrimination.

Thereafter a dispute arose between the parties because of the Employer's refusal to arbitrate certain grievances which the Employer felt would violate the conciliation agreement, if the Union would have been successful before the arbitrator. It would appear that the union would have been successful as the contract seniority agreement went by strict seniority.

The Employer filed a complaint for a declaratory judgment naming the Union as a defendant and later adding the EEOC.

The U.S. District judge ruled in favor of the Employer and EEOC holding that the seniority provisions of the conciliation agreement superceded the seniority provision of the collective agreement.

The Union appealed to the 5th Circuit and on 1/9/78 the Appellate Court reversed the District Court. The order on the mandate came shortly thereafter.

It was stipulated that grievant had more seniority than the female who was retained. It was further stipulated that on 3/8/76 there was a plant reduction and grievant was reduced to an assistant operator and the junior female retained as a junior. This situation prevailed until 5/17/76 when grievant was recalled as an operator. On 10/29/76 grievant was laid off from the plant and the junior female remained as an operator. On 11/12/76 grievant was recalled as a print tender (Labor Grade 3). The junior female was still an operator (Labor Grade 7). On 5/7/78 the junior female was laid off as a direct result of the 5th Circuit's decision.

There is a dispute between the Union and Employer as to the period covered by the grievance. The Union contending that the grievance is from 3/8/76 to the present.

In light of my decision this difference is immaterial. The facts clearly show that the Employer went by the conciliation agreement as it felt it was bound to by the District Court's order. The Employer readily admitted, that as a result of the 5th Circuit's opinion it applied the contract seniority provision and that it was, or would be liable if the matter complained of occurred subsequent to the Appellate Court's decision.

Insofar as the grievant is concerned the matter is moot because he could not be reinstated to the operator's job as the job or jobs are occupied by senior employees. At most back pay would be involved for the alleged period of violation.

Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances.

The award is: The grievance of Albert L. Jowers, No. 78-7 is denied.

/s/ Anthony J. Sabella
ANTHONY J. SABELLA
Arbitrator
August 17, 1978

[BARRETT ARBITRATION AWARD]

IN THE MATTER OF THE
ARBITRATION BETWEEN

W. R. GRACE AND COMPANY,
SOUTHBRIDGE PLASTICS DIVISION
CORINTH, MISSISSIPPI,

—and—

UNITED RUBBER WORKERS,
LOCAL NO. 759

#74-170-127 filed 12/18/74
#75-2-132 filed 1/29/75
No Number filed 11/5/76

Appearances: Mr. T. P. Cole, for the Company;
Mr. G. W. Clark, for the Union

OPINION

Three grievances concerning similar circumstances and events have been submitted for resolution in this proceeding. The disputed cases were joined together at the hearing as essentially one grievance, although they arose separately over a two year period. The basic issue to be resolved is whether the Company is liable to the grieving employees for honoring a Conciliation Agreement between it and the Equal Employment Opportunity Commission (EEOC) when in so doing the Company thereby breached their rights under the seniority provisions of the collective bargaining agreement.

The applicable facts are without significant dispute and concern a background which commenced some seven years ago. In 1972 two black males who were unsuccessful applicants for employment filed a complaint with the EEOC charging the Company with race discrimination in its hiring practices and job classifications. The EEOC

responded with an investigation and on October 5, 1973 issued a reasonable cause determination broadening the original charge by finding that the Company had engaged in unlawful employment practices involving not only race discrimination but also sex discrimination. The Company did not contest this EEOC determination nor did it contest the proposed EEOC remedy, instead executing in 1974 without the participation or agreement of the Union a Conciliation Agreement with EEOC which among other things set aside the negotiated seniority provisions in the Labor Agreement previously executed by the Company and Union to the extent of granting a form of superseniority to female employees.

The Union thereafter filed grievances under its collective agreement with the Company protesting Company violations of individual seniority rights as a result of Company compliance with the Conciliation Agreement. The Company declined to arbitrate these grievances, instead in July 1974 commencing suit in the United States District Court for a declaratory judgment seeking to determine whether the terms of its Conciliation Agreement with EEOC superseded conflicting provisions in its collective agreement with the Union. Throughout the federal court proceedings, which occurred both in the District Court and in the Court of Appeals for the 5th Circuit between July 1974 and January 1978, the Company continued to follow the terms of its Conciliation Agreement with EEOC. Specifically in December 1974 and periodically thereafter economic layoffs were necessitated and, in selecting those employees to be laid off, the Company abided by the seniority provisions of its Conciliation Agreement pursuant to the EEOC determination that the contractual seniority system, although not discriminatory on its face or in its purpose, nevertheless served to perpetuate past discrimination and was therefore illegal. As a consequence senior male employees were laid off while junior female employees were retained at work.

The declaratory judgment litigation instituted by the Company in July 1974 resulted in a U.S. District Court decision in November 1975 holding that the Conciliation Agreement between the Company and EEOC overrode the conflicting terms of the collective agreement between the Company and the Union. The Company was therefore directed by the District Court to continue to comply with the Conciliation Agreement rather than the collective agreement, and the Company did so. However the Union, a defendant in the declaratory judgment action, appealed the District Court ruling and on January 9, 1978 obtained a reversal from the 5th Circuit Court of Appeals which relied upon the 1977 decision of the Supreme Court of the United States in *U. S.* vs. *Teamsters*, 431 U.S. 324, holding that a bona fide seniority system negotiated and maintained without a discriminatory purpose is protected by Section 703 (h) of Title VII even though the system might perpetuate the effects of an employer's pre-Act or post-Act discrimination. The 5th Circuit consequently held that the collective agreement necessarily prevailed over the Conciliation Agreement, and directed the Company to arbitrate the previously-filed grievances arising out of the Company violation of the collective agreement due to its adherence to the conflicting Conciliation Agreement with EEOC. At this time during January 1978 the Company abandoned any further compliance with its EEOC Conciliation Agreement and returned to the application of the seniority provisions negotiated between the Company and the Union in their collective agreement.

The final legal result in the Federal Courts, therefore, was the reinstatement of the collective agreement in January 1978 and thereafter. However, in the period between 1974 when the Company entered into the EEOC Conciliation Agreement in place of its collective agreement with the Union and January 1978, the parties were faced with pending Union grievances which were ruled by the 5th Circuit in January 1978 to be subject to the

arbitration provisions of the collective agreement. This process commenced with the arbitration of one grievance #78-7, on August 16, 1978 before Arbitrator Anthony J. Sabella. The facts involved the demotion and subsequent layoff of a male employee senior to a female employee who was neither demoted nor laid off at the time of the grievance, because of the Company's adherence to the EEOC Conciliation Agreement instead of the collective agreement. On the next day immediately following the hearing, August 17, 1978, Arbitrator Sabella issued his decision denying the grievance upon the following stated ground in his opinion:

> "Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances."

It is upon the foregoing state of facts that the present three grievances must be resolved in this proceeding. It is agreed that on December 19, 1974, on January 28, 1975, on January 31, 1975, and on November 1, 1976, the Company for economic reasons laid off senior male employees while retaining junior female employees in accordance with its EEOC Concilitation Agreement. It is thus evident that, except for the inconsequential difference that the August 1978 arbitration involved a demotion while the instant proceeding involves layoffs, the central issue here is precisely the same issue heard and decided by Arbitrator Sabella. Despite that decision in #78-7 the Union rests upon the undisputed seniority provisions of its collective agreement with the Company, and seeks lost seniority rights, lost back pay and any other lost benefits to the grievants who were improperly

laid off on the specified dates. In the Union view the Sabella decision in #78-7 is not binding in this proceeding because the Arbitrator in the case exceeded his contractual authority in Article IV, Section 3 by failing to confine his decision

> "exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company."

The Company argues in an able brief supported by substantial authority that the decision of an Arbitrator under Article IV, Section 4 "shall be final and binding", and that the Sabella decision in #78-7 therefore constitutes a decisive bar to the Union position in this case. The Company further emphasizes that it at all times sought only to ascertain and to abide by what it considered to be the applicable rule of law, that it followed the Conciliation Agreement with EEOC and not the labor agreement with the Union during the period when the Conciliation Agreement and the subsequent U.S. District Court decision appeared to be legally effective, that it immediately changed its course and reverted back to the labor agreement when the Circuit Court of Appeals so ruled, and that it could not conceivably have anticipated the shifting legal tides to which it was subjected during this period. The Company stresses that it based its action upon the state of the law known at the time as declared in some 30 judicial precedents plus academic commentaries prior to *U.S.* vs. *Teamsters* in 1977, which established a previously unpredictable rule. The Company consequently fully agrees with the rationale expressed in the Sabella decision that it would be "inequitable and manifestly unfair" to subject it to a penalty under these circumstances.

The Arbitrator has carefully reviewed the testimony, the briefs, and the extensive exhibits, and finds that no alternative exists except the granting of the Union

grievances. The parties are entitled to a candid statement of the weight, if any, to be attributed to the Sabella decision in #78-7. The authorities cited in the Company brief correctly set forth the applicable rule that a decision by an Arbitrator is not only final and binding upon the parties in the immediate dispute, but additionally should be followed in all future like disputes between the same parties under the same contract. Although this rule appears to echo the doctrines of stare decisis and comity in the legal system, it is actually grounded upon the contractual provision that an award shall be final and binding, coupled with the unique necessities of the parties to a collective agreement who live within a continuing rather than an ad hoc relationship. In such a relationship, order and stability will be severely jeopardized if the losing party in the forum of arbitration is free to try the case again before a different Arbitrator with an actual opportunity to obtain a different result. It is thus essential to the stability of their relationship that both parties be bound by whatever award flows from their forum of arbitration, so long as the award does no obvious violence to their contract, and that the remedy of the losing party be limited to the arena of collective bargaining in the next period of negotiations rather than to a return match before a different Arbitrator.

This Arbitrator subscribes fully to the foregoing, and emphasizes that he has invariably followed a prior award between the same parties under the same contract in the light of an obligation to the parties. And this obligation exists regardless of any personal evaluation of the relative merit in the prior award. It will not do for an Arbitrator to follow those prior awards involving the same parties under the same contract with which he is in agreement, and to refuse to follow such prior awards with which he personally disagrees. He must inevitably follow all such awards without any picking or choosing, so long as they are issued within the authority of the

Arbitrator and flow from the jurisdiction conferred upon him by the contract.

The essential difficulty with the Company position is that it is relying upon an award which is wholly at variance with the contract and with the Arbitrator's jurisdiction in #78-7. The opinion in #78-7 rests upon a finding that it would be "inequitable and manifestly unfair to penalize" the Company. There is small point in plunging into the thicket of inequity and unfairness, inasmuch as precise standards are non-existent and reasonable people including even Arbitrators may differ, but a balancing of the scales does require note that the grieving laid off employees have also been penalized by the decision of the Company to comply with the Conciliation Agreement while violating the collective agreement. It is fruitless to attempt to evaluate or to quantify the greater penalty in the event of an adverse decision, whether on the Company or on the grievants. It is enough to observe that a decision in either direction will necessarily result in the levying of a penalty upon one side or the other. More importantly for purposes of the issue in this proceeding, it must be further observed that neither side is entitled to insulation from a penalty by virtue of any cited provision in their contract, and it is the contract rather than any claimed principles of equity which must control the outcome of this proceeding. Article IV, Section 4 provides as follows upon this subject:

> "The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company."

The jurisdiction and authority of the Arbitrator "as specified in this Agreement" are set forth in Article IV, Section 3 which provides:

> "The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall

> be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement."

The jurisdiction and authority are drafted and here expressed with somewhat stricter limitations than the "interpretation and application" which normally prevail in collective bargaining agreements. The Arbitrator is "confined exclusively" to the function of interpretation and application, and he may only exercise that function of interpretation and application with respect to "the express provision or provisions" of the contract at issue between the parties.

It is in this light that it must be found that the opinion and resulting award in #78-7 departed in all respects from the jurisdiction and authority of the Arbitrator in that case. The "express" provision at issue was Article VIII, Section 4 protesting the layoff of employee Jowers while a junior female was retained. The issue was whether or not the Company had violated that "express" provision. The ruling of the Arbitrator that it would have been inequitable and manifestly unfair to penalize the Employer, is wholly unsupported by any express provision of the contract, and there is no contention to the contrary either by the Arbitrator in #78-7 or by the Company throughout this proceeding. The Arbitrator in #78-7 thus failed, as he was enjoined by the contract, to "confine" himself "exclusively" to the interpretation and application of any "express" provision of the contract. By so failing, and by fashioning a decision based upon equity utterly unrelated to any provision of the contract, he acted without his authority and jurisdiction as defined in the contract. There is consequently no interpretation or application in #78-7 to be followed in this proceeding, and this Arbitrator to be consistent with

his contractual authority and jurisdiction must necessarily ignore #78-7 and instead resort to the applicable express provisions of the contract. There is no genuine issue upon this phase of the case, inasmuch as the Company does not dispute that it violated its contract with the Union while following the Conciliation Agreement, and it must therefore be found that the Company violated the rights of the grievants in Article VIII, Section 4 and that its action in following the Conciliation Agreement constitutes no valid defense to such violation under the contract which controls in this proceeding.

The Arbitrator is mindful of the Company argument that it has acted in good faith, that in entering into the EEOC Conciliation Agreement it relied upon numerous court decisions at that time which supported its action, and that it could not have anticipated the ultimate decision of the Supreme Court of the United States in *U.S.* vs. *Teamsters* in 1977 and the unexpected consequences of that decision. There is no suggestion in the evidence that the Company at any time herein acted with any motive except good faith. But it is not enough to have acted with good faith, since Article VIII, Section 4 makes no allowance for such a motive and this Arbitrator lacks the authority and jurisdiction to give weight to the obvious good faith of the Company. It may only be added that we are all bound by the law as it is finally declared by the tribunal of highest authority and, in the absence of such a final declaration, that we all act at our peril in relying upon the decisions of tribunals of lesser authority. It was the Company, and not the Union or the grieving employees, which elected to assume the risks of its decision in 1974 to sign an EEOC Conciliation Agreement which in part abrogated its agreement with the Union. The Company may not now validly complain of the unforeseen consequences of that 1974 decision when the Company, however proper its motives may have been, adopted a course of action found three

years later to constitute a violation of law. The alternative urged by the Company, that it now be absolved because the weight of lower courts supported its action in 1974, has no support in the legal system and is so unworkable as to be lacking in any merit.

For the foregoing reasons the award grants the submitted Union grievances.

AWARD

Grievance #74-170-127, filed on December 18, 1974, and Grievance #75-2-132, filed on January 29, 1975, and the unnumbered Grievance, filed on November 5, 1976, are all hereby granted, the Company to compensate the grievants laid off in violation of Article VIII, Section 4 with lost pay, lost seniority, and any other lost rights, from the date of their layoff to not later than the date in January 1978 when the Company renewed its compliance with its collective bargaining agreement with the Union.

/s/ Gerald A. Barrett
GERALD A. BARRETT
Arbitrator

Dated: June 1979

[DISTRICT COURT OPINION BELOW]

U.S. DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

No. EC79-200-S-P

W. R. GRACE AND COMPANY

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA

July 10, 1980

Order July 21, 1980

Peter G. Nash and Dixie L. Atwater (Ogletree, Deakins, Nash, Smoak, Stewart & Edwards), Washington, D.C., and James E. Price and Robert Krohn (Price, Krohn & McLemore), Corinth, Miss., for plaintiff.

Danny E. Cupit and Bobby Sneed (Cupit & Maxey), Jackson, Miss., for defendant.

Full Text of Oral Opinion

SMITH Senior District Judge:—The bench opinion which I am about to render will constitute my findings of fact and conclusions of law with reference to the two motions which are presently pending before the Court. If the opinion is transcribed for any reason, I reserve the right to edit it before it is released, or change or modify it in any way that I see fit.

This litigation is, by no means, a stranger to the Court. I have been involved in several cases in connection with the operation of the Southbridge plant in Corinth, which is owned and operated by W. R. Grace and Company, the plaintiff in this case.

If there is an issue as to a material fact in the case, or if there is a conflict with reference thereto, motions for summary judgment should not be granted, but the case should be allowed to go to trial upon its merits. It is apparent, however, in this particular case, that there are no relevant issues which are in controversy; the facts are well pleaded and well known by all the parties. It is a matter for the Court to apply the law as I find the law to be to the facts as the facts are shown by the record in this case and to come to a conclusion as to which of the motions for summary judgment should be granted.

As a background, however, for my decision in the case, if there is an appeal to the Fifth Circuit, I would like to state certain facts that are reflected by the record. Many of these are well pleaded in the complaint, and I will refer to some of the allegations in the complaint as stating the facts which I find exist and are not in controversy.

This litigation involves the employer, W. R. Grace and Company, and the union, Local Union No. 759, International Union of the United Rubber, Cork, Linoleum, and Plastic Workers of America, who, upon its collective bargaining agreement, represents the employees or most of the employees in the Corinth plant. In this case, the facts involved show that the union represents the employees in the arbitration of grievances which have been filed against the company by the union in favor of its members.

The record shows that I find the fact to be that the parties' 1979 collective bargaining agreement, as well as the 1974 and 1977 agreements, provide that layoffs will be determined solely by employee seniority, except in special circumstances not here pertinent.

On October 5th, 1973, as a result of a charge filed against the company, the Equal Employment Opportunity

Commission (EEOC) determined that reasonable cause existed to believe that the seniority provisions of the collective bargaining agreement were unlawful because they perpetuated the effects of the company's prior hiring discrimination practices against women.

On December 11th, 1974, in order to correct this discriminatory labor practice, the company entered into a conciliation agreement with the EEOC which provided, among other things, that certain seniority provisions of the collective bargaining agreement between the company and Local 759 would be superseded by a system to determine layoffs so that the percentage of women employed by the company would never be reduced by a layoff. The union objected to this change in the seniority provisions of the collective bargaining agreement and sought to have the dispute resolved by arbitration pursuant to the arbitration provisions of the collective bargaining agreement.

The company refused to arbitrate this dispute, and filed suit against Local 759 in Cause No. EC74-90-S in the United States District Court for the Northern District of Mississippi, Eastern Division, seeking to enjoin the union from arbitrating grievances where relief sought in arbitration would conflict with the terms of the conciliation agreement.

The EEOC became a party defendant in that case and counter-claims were filed against the company and cross-claims against Local 759, seeking a declaratory judgment that the provisions of the conciliation agreement superseded any contradictory provisions in the parties' collective bargaining agreement.

On November 23rd, 1975, a final order was entered in Cause No. EC74-90-S, determining that the conciliation agreement was binding on the company and Local 759 and superseded any conflicting provisions of the collective bargaining agreement.

The determination by the EEOC that the company, the plaintiff in this case, discriminated against women in their hiring practices was issued on October 5th, 1973, and contained specific information which I will read into the record.

With reference to respondent's female employment, respondents employ approximately 40 females of a total of approximately 690 employees. All 40 females are employed in the clerical department.

Departmental and plant-wide seniority perpetuates past discrimination against white women who, prior to 1970, were not employed in sufficient numbers and who continue to be confined to certain job classifications; and against black males, who prior to 1969 were not promoted in significant numbers, and who continue to be confined to certain job classifications.

Since respondent has not employed black females in significant numbers in any category, the seniority system will only have a discriminatory impact upon them at some future date.

Accordingly, the EEOC found such a seniority system to be unlawful.

The company was invited to enter into a conciliation agreement, and an agreement was entered into between the EEOC and the company on December 11, 1974. It provided in pertinent part: "The respondent agrees that notwithstanding any provisions of any collective bargaining agreement to which it is a party at its Corinth facility, including a contract with International Union of Rubber, Cork, Linoleum, and Plastic Workers of America and its Local Union No. 759, that the respondent will adhere to the following: a) no female employee whether employed at the present time or hired at future date will be removed from her job or her shift by a male employee by utilization of the shift preference provisions of any collective bargaining agreement in effect at the

Corinth facility; and b) in the event it becomes necessary for the respondent to lay off employees who are covered by any collective bargaining agreement in effect at the Corinth facility and said layoff will result in females being laid off if the applicative provisions of the collective bargaining agreement were utilized in a greater percentage than they constitute the bargaining unit, the following procedure will be utilized. . . ." It then sets forth the procedure in the conciliation agreement, which is at odds, of course, with the seniority provisions of the collective bargaining agreement.

The company filed an action, as I have stated, and on November 26th, 1975, in No. EC74-90-S, the Court entered an order which provided among other things, that: (1) the terms of the conciliation agreement executed on December 11th, 1974, between the plaintiff (W. R. Grace) and defendant (EEOC) are binding upon all parties to this action; and (2) the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759, conflict with the provisions of the conciliation agreement executed by the plaintiff and the defendant EEOC. The court found the latter provisions to be controlling, and all parties to that action were to abide thereby. Southbridge Plastics Division v. Local 759, 403 F.Supp. 1183 (N.D. Miss. 1975).

That case was appealed, however, to the Court of Appeals by the union. The union did not seek to have a stay of the order during the pendency of the appeal, nor did the union seek to supersede the order in any manner. Even though the appeal was perfected, it did not affect the validity of the order during the pendency of the appeal.

During the interim between my decision in the case and the decision by the Fifth Circuit, the Supreme Court of the United States decided the case of United States v. International Brotherhood of Teamsters, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 3896 (1977), and in connection with the appeal in the Southbridge case, the panel of the Fifth Circuit which was considering the appeal issued its

decision reversing this Court's judgment. The reversal was entered January 9th, 1978, and provides in pertinent part: "The union contends that a recent Supreme Court decision, United States v. International Brotherhood of Teamsters (citations omitted), compels this Court to reverse the District Court's order upholding the conciliation agreement. We agree." Southbridge Plastics Div. v. Local 759, 565 F.2d 913 (5th Cir. 1978).

So, between the time I had entered my opinion and order and the time the Fifth Circuit arrived at its decision, the intervening Teamsters case had been decided, and it changed the law a great deal in connection with the matters which were then involved in the Southbridge case.

The Fifth Circuit concluded that in Teamsters, a Title VII case, the Supreme Court held that a bona fide seniority system, which is a system negotiated and maintained without a discriminatory purpose, is protected by § 703(h) of Title VII, even though the system might perpetuate post-Act discrimination.

Then the Court concluded, and I quote from the opinion: "Finally, having determined that the Company and EEOC have not shown the seniority system to violate Title VII, that system, as a part of a binding agreement between the Company and the Union, must control here. Accordingly, pursuant to that agreement, we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement." 565 F.2d at 917.

The particular question involved here is whether, during the pendency of the appeal, the grievances which might have occurred during that time can now be arbitrated, or whether they are not subject to arbitration because of the binding effect of the Court's previous order. That is one of the questions before the Court.

The other question is whether previous arbitration proceedings before Arbitrator Sabella are controlling and his decision should have been recognized by Mr. Barrett when he acted as the second arbitrator in the grievances which are now at issue before the Court.

On a day subsequent to August 16th, 1978, Mr. Sabella, who acted as the arbitrator in Albert L. Jowars, Case No. 78-7, held: "Unquestionably in the period of the violation, the employer was acting in concurrence with the District Court's order as it was required to do. There is no evidence that the employer was not acting in good faith and in accordance with the legal court order. The employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be unequitable and manifestly unfair to penalize the employer under these circumstances."

The decision by Mr. Sabella was not recognized by Mr. Barrett, because he contended that Mr. Sabella had exceeded the scope of his jurisdiction, going outside the plain, written terms of the contract between the union and the company in order to arrive at that conclusion. Of course, if the matter was to be decided solely upon the contract itself and on its terms without any reference to the procedures before the Court, I would have to hold that the grievances could and should have been arbitrated; and that within the plain terms of the contract, Mr. Barrett would be right in his conclusions.

However, I think we must look at public policy in matters of this kind. EEOC is charged with the statutory duty to eliminate discrimination in employment practices on account of race, creed, religion and sex. Acting on that authority, EEOC came into contact with the plaintiff in this case, and after investigation of the matter, arrived at the conclusion that its practices in the employment of blacks and women had a discriminatory effect against people in those categories. The agency demanded that Southbridge enter into a conciliation agreement, for

which provision is made in the Act, in order to avoid court procedure in effecting the purposes of the Act and removing discriminatory practices of employment.

In so doing, the EEOC found that the seniority provisions of the collective bargaining agreement with the union would conflict with the provisions of the conciliation agreement.

The company was faced with the question of whether it should abide by the terms of the conciliation agreement or by the terms of the collective bargaining agreement and thereby render itself potentially liable in an action brought by the EEOC. The company decided to have a judicial determination of that matter, and it presented the facts to the Court. The EEOC came into the case, presented the facts to the Court, and on facts which then existed, the Court found under the prevailing law at the time, the collective bargaining agreement would have to give way to the provisions of the conciliation agreement.

The union was dissatisfied with the Court's judgment in the case and appealed to the Fifth Circuit. But, in doing so, the union did not take any action to stay the Court's order by taking a supersedeas bond so as to make the Court's order ineffective.

The union elected to go along without asking this Court or the Court of Appeals for a stay. In the meantime, as I have said, there was a change in the applicable law.

The contract itself provides in Article IV, paragraph 3, that "The jurisdiction and authority of the arbitrator of the grievance in his opinion and award shall be confined exclusively to the interpretation and application of an express provision or provisions of this agreement at issue between the union and the company. He shall have no authority to add to, adjust, change or modify any provision of the agreement."

Paragraph 4 of the same article states, "The decision of the arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this agreement shall be final and binding upon the aggrieved employee or employees, the union and the company."

Article XIII of the contract contains a nondiscrimination provision, which provides that both the company and the union agree that they will not discriminate against any employee because of sex, race, color, creed, age, nationality or religious beliefs, and that both parties will abide by and comply with all applicable federal laws banning discrimination in regard to hire, promotion, and job assignments. It is understood that the application of this article and this section applies specifically to such discrimination due to employee sex, race, color, creed, age, nationality or religious beliefs.

Then a general provision under Article XIX provides, "In the event that any provision of this agreement is to be found in conflict with any state or federal law now existing or hereafter enacted, it is agreed that such law shall supersede the conflicting provisions without affecting the remainder of these provisions."

It is my opinion that these two paragraphs were a part of the collective bargaining agreement under Arbitrator's Sabella's jurisdiction and consideration at the time he rendered his opinion, and that during the pendency of this Court's order which was in effect and had not been superseded, the company, the union and the EEOC, were bound by its terms and conditions. If the order had been violated in any respect by any of the parties, the parties would have been subject to a contempt action on the part of the Court because of failure to comply with the Court's order.

I do not believe that public policy will permit that kind of a situation to exist and not give some protection to the people who are parties to the collective bargaining

agreement, especially in the absence of a stay or in the absence of some petition to the Court to permit grievances to be arbitrated while an appeal is in progress.

In addition, at that time, this Court's order was the law of the case, as well as the law of the collective bargaining agreement. The Court had specifically held that the conciliation agreement provisions had the effect of nullifying the seniority provisions in the collective bargaining agreement when such came in conflict with the provisions of the conciliation agreement. That conciliation agreement was designed, in the opinion of the EEOC, to eliminate all vestiges of discrimination against women, as is involved in this case, and blacks, which are not involved here.

On the basis of my holding and upon the basis of the undisputed facts which are in this record, I find first, that any grievance that arose prior to the reversal of this Court's order by the Fifth Circuit cannot be the subject of a grievance under the collective bargaining agreement. The company and all the other parties involved in the grievance were affected by that order, and grievances involving actions by the company during that period of time are not such as can be arbitrated. Upon the Fifth Circuit's reversal of this Court's judgment, the Court was directed to enter an order providing that the union should prevail and that the contract provisions of the collective bargaining agreement would govern seniority matters; that order was entered by the Court in compliance with the mandate of the Court of Appeals.

From that time on, the seniority provision of the union's collective bargaining agreement with the company has prevailed and will be enforced.

Secondly, I find that Arbitrator Sabella acted on a matter which was essentially the same as the matter involved in this case; that is, a layoff. In that layoff the female was retained over a male employee who had

greater seniority. There is some argument made here that the facts are different because in one case there was a demotion which was involved, whereas here, there is a layoff. I do not believe that such a difference exists, because the effect of the layoff in the prior case was the same: The male employee who was laid off had the right to take the job of someone down the line who did not have as much seniority; the effect being to demote an employee to a lower-paying position. I do not think that there is any difference between the two situations. The essential factor in Sabella's decision was that during the pendency of the appeal, the order of the court was in effect and had to be obeyed by the parties.

There is some argument made with reference to the case of San Antonio New Guild, Local 25 v. San Antonio Light Division, 481 F.2d 821 (5th Cir. 1973), being dispositive of this case. However, I think it can be distinguished from the facts here involved.

In that case, there was the question of ambiguity of the first arbitrator's award as to the amount of back pay that the terminated employee was entitled to receive. When the dispute arose as to the amount of the award, rather than the award itself, it was referred to another arbitrator by consent of the parties and settled by the second arbitrator. The Fifth Circuit said that it would be useless to remand the case for the matter to be referred to the first arbitrator for clarification.

I do not feel that that case is controlling.

My decision is, in summary, that the motion for plaintiff for summary judgment should be granted and the motion by the defendant for summary judgment should be denied.

Counsel for plaintiff may submit to the court within 10 days an order to carry into effect the Court's ruling.

Is there any question now by any of the parties involved in this matter?

MR. SNEED:
No, Your Honor.

THE COURT:
The plaintiff?

MR. NASH:
No, Your Honor.

THE COURT:
All right. The Court will be in recess then until 2:00 o'clock this afternoon.

Order

This case being heard on Plaintiff's and Defendant's cross-motions for summary judgment, and the Court having fully considered the positions of the parties and finding that there is no genuine issue of material fact and further finding, for the reasons stated in the Court's decision rendered on July 10, 1980, that Plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is granted and that the arbitration award of Gerald A. Barrett is hereby vacated and denied enforcement, and it is

FURTHER ORDERED, that Defendant is hereby permanently enjoined from prosecuting any other or further grievances to arbitration because of lay offs made or other actions taken by Plaintiff in accordance with the provisions and requirements of its December 11, 1974 conciliation agreement with the EEOC if such actions were taken prior to the time this Court's November 1975 Order in Case No. EC74-90-S was vacated, and it is

FURTHER ORDERED, that Defendant's Motion for Summary Judgment is denied.

[U.S. COURT OF APPEALS OPINION BELOW]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit A

No. 80-3661

W. R. GRACE AND COMPANY
Plaintiff-Appellee,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA
Defendant-Appellant.

Aug. 10, 1981

Cupit & Maxey, Danny E. Cupit, Robert W. Sneed, Jackson, Miss., for defendant-appellant.

Ogletree, Deakins, Nash, Smoak, Stewart & Edwards, Peter G. Nash, Dixie L. Atwater, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case involves an appeal from a summary judgment granted by the district court setting aside a labor arbitration award in favor of defendant union and enjoining the union from further pursuing similar claims through the grievance procedure. This simple statement of the immediate issue before the Court, however, rests upon an Equal Employment Opportunity Commission determination of racial and sex discrimination, a conciliа-

tion agreement with EEOC, an arbitration award prior to the one here challenged, a prior decision of the district court, and a prior decision of this Court. The scene of the development of this industrial relations imbroglio is the plant of the Southbridge Plastics Division of W. R. Grace & Company, in Corinth, Mississippi. At all times involved in the events of this case, defendant union, Local No. 759 of the International Union of United Rubber, Cork, Linoleum and Plastics Workers of America was the certified bargaining representative at the Corinth plant for the employees involved.

In 1972, two black male employees filed a charge against the company with the Equal Employment Opportunity Commission, claiming that the failure to promote them was with racially discriminatory motive. The EEOC made a thorough investigation of the conditions at the plant. It concluded that there had been racial discrimination as to some employees and remedies were agreed upon. At this point, we drop the issue of racial discrimination entirely from the case.

In its investigation the EEOC also determined that the company had been discriminating against women in its employment practices. Its entire cadre of female employees was clerical, and the EEOC found that there had been discrimination in not giving women opportunity to work in the operating or production phase of the business. As the result of the EEOC investigation, in 1974 the company and the Commission signed a conciliation agreement under which the company agreed to cease its discriminatory practices. A further part of the agreement contained a provision that its terms would override the seniority provisions of the collective bargaining agreement between the parties. The reason underlying this provision of the conciliation agreement, of course, was the conclusion that there having been discrimination in the past, this discrimination would be perpetuated if the company strictly followed contract seniority. Those who

had been discriminated against in the past would have lower job and departmental seniority.

While the union knew that such an agreement was being developed, it did not participate in the negotiations. Nor did it sign the agreement or approve it in any way, although it was given the opportunity to do so.

Shortly after the conciliation agreement was signed and the company began to follow it, the union instituted grievance proceedings to establish the seniority rights of male employees who had been laid off while female employees junior to them had been retained in operator positions. The union having insisted that these grievances go to arbitration, the company brought suit in the United States District Court under § 301(a) Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), seeking to enjoin the union from arbitrating grievances where the relief sought in arbitration would conflict with the terms of the conciliation agreement the company had entered into with the EEOC. The EEOC also counterclaimed and crossclaimed against the company and the union seeking a declaratory judgment that the provisions of the conciliation agreement superseded the seniority provisions of the collective bargaining agreement.

In November 1975, the district court held that the conciliation agreement was binding on the company and the union and superseded any conflicting provisions in the labor agreement. It enjoined the arbitrations requested by the union. It rendered a declaratory judgment that the conciliation agreement was binding on all parties to the action and that the seniority provisions of the collective bargaining agreement were in conflict with the conciliation agreement. *Southbridge Plastics Division* v. *Local No. 759*, 403 F.Supp. 1183 (M.D. Miss. 1975). The union appealed to this Court.

While the union's appeal was pending, the United States Supreme Court decided *International Brotherhood*

of Teamsters v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In that case the government had brought suit claiming the employer and the union were engaging in racial discrimination. The government urged the theory, which the EEOC used in this case, that the seniority system in the collective agreement had to yield to the corrective action necessary to eliminate the effects of discriminatory employment practices. The United States Supreme Court found, however, that the seniority systems involved were "bona fide" and, therefore, were specifically protected by § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court asserted at p. 350 of its opinion that the legislative history is clear: Title VII was to have no effect on "established seniority rights." Its effect was to be "prospective" only. The Court conceded that a seniority system could tend to perpetuate the effects of discrimination. But the Court held, nevertheless, that the statute protects "bona fide" seniority systems so long as they do not fall within the proviso which prohibits differences in treatment of employees which are the result of "an intention to discriminate." The Court specifically held: "[T]he union's conduct in agreeing to and maintaining the [seniority] system did not violate Title VII." p. 356. The Court directed the district court to vacate the injunction against the union.

When the appeal of the union in the principal case came on to be heard before this Court, we reversed the district court's decision, relying at least in part upon the Supreme Court's decision in the *Teamsters* case. *Southbridge Plastics Div.* v. *Local No. 759, Etc.*, 565 F.2d 913 (5th Cir. 1978). We also made reference to *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), which had followed the *Teamsters* case and had held that a discriminatory purpose must be shown before a seniority system can be

found not to be bona fide.[1] At p. 916 we said: "[W]holesale destruction of this (seniority) system as authorized by the conciliation agreement cannot be permitted." We concluded by granting the union's counterclaim "seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement." p. 917.

The company, which had been operating in accordance with the district court's order by following the conciliation agreement rather than the seniority provisions of the collective bargaining agreement, immediately changed its policy in response to the decision of this Court. It began again to follow the bargained seniority plan in the contract.

Our holding, as set out above, had directed arbitration of the grievances filed by the union protesting the company following the conciliation agreement over the seniority provisions of the contract. One such case was submitted to arbitrator Anthony J. Sabella. It involved a male operator who had been reduced in grade and later laid off while junior female operators were retained. Arbitrator Sabella held in favor of the company. His entire opinion insofar as it states his reasoning for his award is as follows:

> Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The

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[1] The Court also relied upon *Stevenson v. International Paper Co.*, 516 F.2d 103, 118 (5th Cir. 1975) (holding the power to enjoin application of a seniority system must be limited to the requirements of Title VII), and *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *amended and modified on other grounds*, 556 F.2d 758 (5th Cir. 1977) (elaborating on the need for "circumspection" in replacing contract provisions with Title VII requirements).

> Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances.

The union, however, continued to process grievances involving the same issue. The company went along with the union and submitted some of those grievances to Arbitrator Gerald A. Barrett, asserting its claim that the Sabella award involving the same issue was controlling. Arbitrator Barrett upheld the union's grievances. The company then brought this suit to set aside the Barrett award and enjoin pursuit of further similar grievances. § 301 LMRA, 29 U.S.C. § 185(a).

We reverse the district court and render summary judgment for defendant union enforcing the Barrett arbitration award.

THE POWER OF THE SECOND ARBITRATOR

The precise issue before this Court is whether the second arbitration involving the same factual situation, the Barrett award, should be set aside as invalid. This question, however, turns in large measure on whether the earlier Sabella award which yielded a contrary result was itself valid. In general, it is established that an arbitrator will follow a prior award on controlling facts under the same contract. *Local 103, Int'l U. of Electrical, Radio and Machine Workers, AFL-CIO* v. *RCA Corp.*, 516 F.2d 1336 (3rd Cir. 1975); *Westing-House Electric*, 45 L.A. 899 (1965); *Sears, Roebuck & Co., Inc.*, 39 L.A. 567 (1962). *But compare Westinghouse Elevator of Puerto Rico* v. *SIU de Puerto Rico*, 583 F.2d 1184 (1st Cir. 1978), reviewing a second arbitration award on the established narrow grounds without regard to the fact that it was contrary to a prior award between the same parties.

Arbitrator Barrett in his award recognized this principle. But it is also established that if an award exceeds the arbitrator's jurisdiction or authority, does not draw its essence from the collective agreement, it cannot be

considered to be binding. *Torrington* v. *Metal Products Workers*, 362 F.2d 677 (2nd Cir. 1966) (setting aside such an award). *See also Amalgamated Meat Cutters and Butcher Workmen of North America, Dist. Local No. 540* v. *Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973), recognizing the principle but in the particular case upholding the award. In *San Antonio Newspaper Guild, Local No. 25* v. *San Antonio Light Div.*, 481 F.2d 821 (5th Cir. 1973), this Court granted enforcement of a second arbitrator's award when the first award was imperfect and inconclusive.

The awards of arbitrators go further. There is a substantial body of jurisprudence reflected in arbitration awards which holds that the second arbitrator need not follow the earlier arbitration if it is found to be "plainly erroneous." For a discussion of this principle see arbitrator Goldberg's opinion in *Mallinckrodt Chemical Works*, 50 L.A. 933, 935 (1968). For other similar arbitration awards see *Carbon Fuel Co.*, 67 L.A. 1038 (1976); *American Smelting & Refining Co.*, 59 L.A. 340 (1972); *Coleman Co., Inc.*, 52 L.A. 357 (1969); *American Cyanimid Co.*, 49 L.A. 314 (1967); *American Steel Foundries*, 19 L.A. 779 (1952).[2]

The contract involved in this case contains what is a typical, but not always included, "finality" clause. Article IV, Section 4, reads:

> . . . The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company.

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[2] For an even more extreme statement see arbitrator Justin's opinion in *Federal Bearings Co., Inc.*, 22 L.A. 721, 725-6 (1954), "The arbitrator may consider prior awards between the parties . . . but he is not bound to follow them." "As long as the arbitrator keeps within his jurisdiction, he can decide the issues submitted to him, notwithstanding any prior awards between the parties, unless the parties have agreed otherwise."

The existence of this clause in the contract was also relied upon by arbitrator Barrett in taking the view that an award which is within the jurisdiction and authority of the arbitrator should be considered binding in the subsequent arbitration. The role of a finality clause is stressed in the case of *Local 616, Int'l U. of Electrical Radio and Machine Workers, AFL-CIO* v. *Byrd Plastics, Inc.*, 428 F.2d 23, 26 (3rd Cir. 1970) (a finality clause gives "something similar to res judicata" in the context of labor arbitrations).

It is not necessary in this case to make an authoritative decision as to the extent to which a prior arbitration award should be considered binding upon a subsequent arbitrator when the issue involves the same facts and the same contract provision. We assume that such a prior award is binding, as arbitrator Barrett did assume, if it is within the "jurisdiction and authority" of the arbitrator who makes the award. But there is also no dispute in the law that if the decision of the arbitrator is not "within his jurisdiction and authority" it is invalid. Resolution of the issue raised by the words "jurisdiction and authority" will answer the question of whether the Barrett award can stand in view of the earlier Sabella award.

It is from the third case of the well-known "trilogy" of Supreme Court cases in labor arbitration[3] that we find the origin of the decisive and unwavering authority on this issue. The case is *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 85 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In contrast to the other two cases of the trilogy, *Enterprise Wheel & Car* involved a suit to enforce an arbitration award rather than a suit

[3] The trilogy consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), and *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), plus the *Enterprise Wheel & Car* case cited and discussed above.

to force a recalcitrant party to carry out its promise to arbitrate. The issue in *Enterprise Wheel & Car* was whether the arbitrator had exceeded his jurisdiction in awarding back pay. The Court found that a portion of the arbitrator's award was unclear as to whether or not he had exceeded his jurisdiction. In the following statement, the Court clearly outlined the law which must control the evaluation of arbitrators' awards against the claim that they have moved outside their authority:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's' words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. p. 597, 80 S.Ct. at 1361.

A second arbitrator cannot be bound by an arbitration award which violates the obligation outlined in *Enterprise Wheel & Car* since the award is not valid and can be set aside. The finality provision of the contract between the parties in this case makes this principle clear since it provides for finality only if the arbitrator's award is "within his jurisdiction and authority as specified in this Agreement."

Since the issue of the setting aside of the Barrett award turns largely on the issue of whether the arbitrator acted improperly by not considering himself bound by the earlier Sabella award, the core inquiry in this case, as both parties recognize, is whether the Sabella award can stand or was outside his jurisdiction and authority. Normally the scope of an arbitrator's jurisdiction and authority is wholly dependent upon the agreement of the parties, since they create the tribunal. But in this case there is an added dimension to this requirement, as will

be shown later, by virtue of our decision in *Southbridge Plastics.*

THE TERMS OF THE CONTRACT

The typical collective bargaining contract provides in general that the arbitrator will be used to resolve disputes between the parties as to the meaning, interpretation and application of the provisions of the collective bargaining agreement, *e.g., United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 565, 80 S.Ct. 1343, 1345, 4 L.Ed.2d 1403 (1960), and it nearly always adds a prohibition against the arbitrator adding to, subtracting from, or modifying the agreement in any way. *See Amalgamated Meat Cutters, Etc.* v. *Neuhoff, supra* at 819; 2 BNA, Negotiations and Contracts ¶ 51:281.

The comparable clause in the collective agreement between these parties, Article IV, Sec. 3, is stronger than the typical clause. It reads:

> The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement.

This provision shows a stringent requirement by the use of the word "exclusively" and even more by use of the word "express." The second sentence of the provision withdrawing from the arbitrator any "authority" to "add to, adjust, change or modify any provision" of the agreement also is strong and unambiguous. The use of the word "authority" ties immediately into the reference in the next provision in the contract, Article IV, Sec. 4, printed above, which makes an award final and binding only if it is within the "authority" of the arbitrator.

The district court concedes in its opinion that under the "plain terms" of the contract provisions, the Barrett award was correct and should control, absent other considerations. This conclusion is inescapable since arbitrator Sabella did not even refer to the collective bargaining agreement in his award but referred only to the fact that "it would be unequitable and manifestly unfair" to hold against the employer. There is nothing in the contract about the arbitrator balancing the equities or deciding whether something is unfair or not. Literally, the Sabella decision departed from the terms of the collective bargaining agreement.

THE LAW OF THE CONTRACT

For many years there has been a philosophical and jurisprudential dispute among labor arbitrators as to whether they are entitled to and whether they should look outside the actual wording of the contract to laws which may require the parties to act in ways different from those provided for in the agreement itself. *See* Gorman, Basic Text on Labor Law, p. 543. The discussion, however, becomes unrealistic when the wording of the collective agreement is clearly in conflict with law. It is elementary that a contract provision contrary to law is unenforceable and does not bind the parties. 6A Corbin, Contracts §§ 1373-5; Fairweather, Practice and Procedure in Labor Arbitration, p. 117.

In this case the company relies upon this principle to urge that the law of the contract at the time the grievances arose was the law established by the district court and later reversed by this Court. Within the terms of the contract itself, the company relies upon Article XIV, Section 7, which provides:

> In the event any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting

provisions without affecting the remainder of these provisions.

The company contends that the law of the contract at the time these grievances arose was the order of the district court that the conciliation agreement be obeyed—the decision later reversed by this Court. It would follow that if this contention is correct, then the company was complying with the law, and therefore with the law of the contract at the time these grievances arose. This would mean that the Barrett arbitration should be set aside because it did not follow the terms of the contract as effectively modified by the requirements of the law. This would still not necessarily make the Sabella award valid because the Sabella award was not based upon the contract as it applies in the light of the law, but was based solely upon equitable principles and fairness. So under this company theory, the issue becomes whether the Barrett award was within his jurisdiction and authority.

In answering this question the starting point must be that in general the law is now but also has in the past been what the highest tribunal which considers the issue decides is the law. It is in the essential nature of judicial decisions that they normally do not enact law but declare the law which already exists. For example, when one party to a contract declares it rescinded because of a breach by the other party, the first party is running the risk that a court will decide that the other participant in the contract did not engage in a material breach. The rescinding party will find himself liable for damages for an action which he took months before and which he felt was in law a valid action. Of course, other examples abound. Companies may be held liable for triple damages under the anti-trust laws for actions taken years before which the companies felt in good faith were legal at that time. A publisher or author of a book may not know it is obscene or libelous until a jury says so one or two years later, at which time the publisher or author be-

comes liable to a jail sentence or damages for something he in good faith believed was lawful to publish.

One of the clearest examples in the law of the situation where persons may in good faith believe they are acting properly but nevertheless be found to be responsible in damages for improper conduct is in the secondary boycott provisions of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (unfair labor practice), and 29 U.S.C. § 187 (creating civil liability for exactly the same conduct). It is well established that a NLRB determination not to prosecute a union for violation of § 8(b)(4) is not res judicata and does not bar a suit for damages under § 187 for the same episode. In other words, the union may not only be in good faith before charges are filed that it is not violating the secondary boycott provisions, it may be further convinced by the Board considering its actions but deciding not to prosecute a complaint under § 8(b)(4), but still be found liable for damages under § 187. *Aircraft & Engine Maintenance & Overhaul, Bldg., Const., Mfg., Processing & Distribution & Allied Industries, Emp., Local 290, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America* v. *Oolite Concrete Co.*, 341 F.2d 210 (5th Cir. 1965), *cert. denied*, 382 U.S. 972, 86 S.Ct. 529, 15 L.Ed.2d 465 (1966). *Accord, Clark Engineering & Const. Co.* v. *United Broth. of Carpenters and Joiners of America, Four Rivers Dist. Council*, 510 F.2d 1075 (6th Cir. 1976). *See also Painters Dist. Council No. 38, Broth. of Painters, Decorators & Paperhangers of America, AFL-CIO* v. *Edgewood Contracting Co.*, 416 F.2d 1081, 1085 (5th Cir. 1969). These examples of the usual retroactive effect of an appellate court decision reversing a lower court decision or the decision of an administrative agency can be multiplied a thousand fold.

Does this case fall within the usual pattern arising from the reversal of an administrative decision and a lower court decision? As detailed above, the decision of

the district court in this case which held that the conciliation agreement superseded the seniority provisions of the collective agreement was reversed on appeal by this Court after the Supreme Court had decided *International Brotherhood of Teamsters* v. *United States*. In the *Teamsters* case the Court held that the proviso in Title VII of the Civil Rights Act was clear in establishing that the requirements of the Act did not supersede a bona fide seniority system in a collective bargaining agreement. There is no indication in the opinion that the Court was conceiving of itself as changing the law prospectively. It was relying on the wording of the statute as it was passed and giving its interpretation of the law as it had existed from the enactment of the statute. It freed the union from a lower court decision which had held that the union had participated in violating the law by insisting on seniority rights.

The decision involving these parties which followed that Supreme Court decision in this Court, *Southbridge Plastics Div.* v. *Local No. 759, Etc.*, also declared the law as it had existed throughout. There is nothing in our opinion which indicated that the employer was authorized to have followed the conciliation agreement. Our opinion took its place within the usual and overwhelming pattern of judicial opinions which declare the law as it existed in the past, controlling the actions of the parties. The concluding paragraph of Judge Morgan's opinion in *Southbridge Plastics* reads:

> Finally, having determined that the Company and the EEOC have not shown the seniority system to violate Title VII, that system, as part of a binding agreement between the Company and the Union, must control here. Accordingly, pursuant to that agreement, we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement. p. 917.

This conclusion makes clear the fact that the Court was declaring the law as it had existed between the parties at the time the company was following the conciliation agreement. The opinion referred unmistakably to the company's action in doing so as a "breach" of the binding contract between the parties. This decision embodied the typical result of finding a party in breach of contract and therefore vulnerable to the damages occasioned by the breach. There is not the slightest hint of any recognition that the contract provided otherwise before the decision so that the company could be found acting in accordance with its legal obligations when it was following the conciliation agreement. Instead, our opinion found the company was in breach of the contract during this period.

Under the promises of the parties in this collective bargaining contract, the damages for breach of contract are to be determined through the arbitration process rather than in court. When the case is seen thus in its proper posture, it is revealed with clarity that the Sabella award exceeded any jurisdiction or authority granted him by the collective agreement. This Court held that the seniority provisions of the agreement were in effect, had been in effect throughout, and had been binding. It further held that the company had breached those provisions. Its referral back to the parties to carry out their promise to arbitrate was far narrower than arbitrator Sabella conceived. He was given no authority to ignore the seniority provisions of the contract and to decide the case on the basis of equity and fairness. His award clearly exceeded his jurisdiction and authority.

In a situation with broad similarities, this Court defined the nature of the action we took in the *Southbridge Plastics* decision. The case is *National Airlines, Inc.* v. *International Assoc. of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970). That case was the second appeal in a dispute arising from the mass dis-

charge by the airline of wildcat strikers while freeze provisions of the Railway Labor Act were in effect. In the first appeal, 416 F.2d 998 (5th Cir. 1969), we held the mass discharge of the strikers under the circumstances exceeded the permissible bounds of National's legal authority to engage in self-help. We held that National was entitled only to hire those replacements for the strikers necessary to be able to operate its airline. The case was then remanded to the district court to determine the rights of the strikers as to reinstatement in accordance with this holding.

In the second appeal, we found that the district court had not followed our mandate. The district court had itself assumed the task of defining again the permissible limits of self-help. After hearing more evidence, the district court had determined that no strikers were entitled to reinstatement. Upon the second review, this Court held the earlier holding had withdrawn from the district court the authority to redefine the permissible limits. We had defined those limits in our decision. Instead, the only matters which the district judge was entitled to determine were the details as to which strikers had not been properly replaced and as to the reinstatement of those strikers.

Substituting in this case the arbitrator for the trial court in *National Airlines*, which is what the parties had provided for in their contract, this case is so closely analogous as to be virtually controlled by our earlier decision in *Southbridge Plastics*. In the last paragraph of Judge Morgan's opinion, quoted above, we withdrew from the authority of the arbitrator any right to decide that the employer had not breached the contract and, therefore, was not liable to the employees for having followed the conciliation agreement. It was determined by the specific holding that the employer had breached the contract. Our interpretation of the contract is res judicata and is binding. Arbitrator Sabella's decision is directly con-

trary to our holding. He specifically found no breach. This Court's binding decision left as the only issues before the arbitrator which employees had been victims of the breach and damages for the breach. Our holding meant the arbitrator was no longer free to decide whether the employer should be liable for a breach or not.

In summary, the wording of the contract itself is restrictive enough to reveal that arbitrator Sabella exceeded his jurisdiction and authority, but also he exceeded the authority defined for him specifically by the holding of this Court in the *Southbridge Plastics* decision. Further, this same analysis reveals that arbitrator Barrett's decision is correct under the collective bargaining agreement and under our *Southbridge Plastics* mandate. He applied the seniority provisions of the contract, recognized that the employer had breached them, and he awarded damages to the employees who had been injured by the employer's breach. In doing so he properly refused to follow the earlier Sabella award.

The company urges, however, that the union waived its right to attack the Sabella award by not bringing a suit in court to set it aside. This assertion cannot prevail. The union elected to choose arbitration as the means of setting aside the Sabella award. Under the well established national policy favoring arbitration,[4] this was a proper decision to make. The union had the right to choose this means of attacking the earlier award. As has been pointed out above, there are many instances of second arbitrations being pursued as a means of evaluating the validity of earlier arbitration awards. In *San Antonio Newspaper Guild, Local No. 25* v. *San Antonio Light Div., supra,* this Court upheld as binding a second award which resolved issues left so unclear by a first award that we held the first award unenforceable. It is

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[4] *United States Steel Corp. v. United Mine Workers,* 519 F.2d 1236, 1242 (5th Cir. 1975), *rehearing denied,* 526 F.2d 376 (1976), *cert. denied,* 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976).

established that if a party to the contract demands a second arbitration to test the validity of the first arbitration, the courts will order the second arbitration because it is for the arbitrator to determine in the first instance whether the prior award is valid. *Local 103, Int'l U. of Electrical, Radio and Machine Workers* v. *RCA Corp., supra; Avco Local Union No. 787, Int'l U. United Automobile Aerospace & Agricultural Implement Workers of America*, 459 F.2d 968 (3rd Cir. 1972).

A BINDING COURT ORDER?

The conclusion reached immediately above settles the contention of the company that the district judge in the original *Southbridge Plastics* case had issued an order which was binding on the company to apply the conciliation agreement rather than the seniority provision of the collective bargaining agreement. The Court held otherwise by finding the company in breach of contract. But the company contends that it had "no choice" but to obey the order of the district court, even conceding it was voidable on appeal. The company contends that the union should have sought a supersedeas or stay pending the appeal of the decision of the district court which had declared the conciliation agreement applicable (*Southbridge Plastics*). The district judge several times in the case which is before us emphasized in his opinion the fact that the union had not sought a supersedeas.

The impact of this contention must be made clear. The union pursued its remedy by way of appeal to this Court. It did not seek a supersedeas or stay because it followed the district court order pending the appeal. As any law abiding citizen is entitled to do, it bided its time pending its appeal until it could win on appeal.

What the company is urging and what the district judge in this case suggested is that the union should be responsible for obtaining a supersedeas on behalf of and for the benefit of its adversary, the company, so that the

company would not be liable in damages if the union won on appeal! Seen in this light, of course, the contention is wholly without merit. The union was not its adversary's keeper. It was pursuing its own lawful remedies in its own way and in no way was defying any decision by the district court.

The company's assertion that it "had no choice" but to obey the order of the district court cannot stand. It did have other choices. It could have appealed. It could have asked for a stay or a supersedeas. It did not do so. Instead it did what many litigants do, it simply predicted the result by obeying the district court and trusting that the decision of the district court would not be reversed on appeal. To do this was within its rights, but having been wrong about the law of the case, it became obligated to pay for the damage done to the employees because it did obey a court order which could not stand on appeal.

The case which faces us is simply a case of a party relying upon an order of a court under appeal to the detriment of other persons injured by the reliance. Without even seeking to appeal, to obtain a stay or a supersedeas, the company cannot now take the position that it "had no choice" but to obey the court order which was based upon an incorrect interpretation of the law. Further, as mentioned above, this Court's decision reversing the district court in *Southbridge Plastics* in terms forecloses as well the assertion of an obligation to obey the district court order. It finds that the employer breached the contract, and the case was returned for the arbitration of the claims of the particular parties injured by that breach. The contention by the company that it was bound and had no choice but to obey is inconsistent with this Court's conclusion that the company had breached the contract by obeying the order.

FAIRNESS AND EQUITY

Closely related to the issue of the asserted binding effect of the order of the district court in the *Southbridge Plastics* case, is the general assertion upon which the Sabella arbitration award was based and upon which the district judge in this case heavily relied. Arbitrator Sabella and the district judge asserted that it would be unfair, inequitable, and contrary to public policy to require the company to pay for its actions when it was following what it thought to be the law as exemplified in the conciliation agreement. These assertions that it is inequitable to place this burden upon the company are remarkable in that they do not discuss nor even mention the inequity of the deprivation of the employees entitled by the law of the contract each to his status and to the wages which go with that status.

This entire series of events began because the company was violating Title VII of the Civil Rights Act by discriminating on a racial basis and on the basis of gender. There is no question but that the company was in entire good faith in signing the conciliation agreement with the EEOC and following it. But legally it was wrong. It was breaching the collective agreement the company had with the employees. On the other hand the employees' conduct throughout all of these events was impeccably correct. They had not violated Title VII of the statute. They did not agree to the illegal conciliation agreement. Instead, without defying any court order or acting improperly in any way they pursued their legal rights in court. And they won. Yet it is said that the equities favor the employer.

If the company is excused from paying damages for its failure to follow the seniority agreement, its monetary advantage comes directly out of the wages of the workers who are deprived of the back pay to which they are entitled under those seniority provisions. Relieving the company of its obligations would simply be saying that

the employees, those who had done nothing wrong and were correct in the law, must bear the financial loss, and those who did violate the law and later followed a course of conduct which, while in good faith, was not authorized in the law are excused from financial responsibility. The injustice, unfairness, and violation of public policy of such a conclusion would indeed be shocking. The equities are on the side of those, the employees and their representative, who have not violated any law, even in good faith, who have pursued their rights in accordance with law throughout this entire proceeding, and whose rights were vindicated in court and in arbitration.

It follows that the district court was in error in granting summary judgment for the company. Instead, a summary judgment enforcing the Barrett arbitration award as requested by the union should have been granted.

REVERSED. Defendant's motion for summary judgment is GRANTED.

[JUDGMENT OF THE COURT OF APPEALS BELOW]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3661

D. C. Docket No. EC79-200-S-P

[Filed Oct. 26, 1981]

W. R. GRACE AND COMPANY,
Plaintiff-Appellee,

VERSUS

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and defendant union's motion for summary judgment granted.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendent-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1981

A true copy

Tests GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ R. Adeline Barnes
Deputy
New Orleans, Louisiana

Issued As Mandate: Oct. 16, 1981

[COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3661

W. R. GRACE AND COMPANY,
Plaintiff-Appellee,

VERSUS

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 10, 5 Cir., 1981, —— F.2d ——).

(September 28, 1981)

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January

14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerre S. Williams
United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for stay of the mandate.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

W. R. GRACE AND COMPANY,
Petitioner,

vs.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the United States Court of Appeals for the Fifth Circuit in this matter contrary to the decisions of this Court and other courts of appeals so as to render granting the petition for writ of certiorari in this case appropriate?

a. THE FIFTH CIRCUIT DID NOT DECIDE THE MERITS OF THE DISPUTE BEFORE ARBITRATOR SABELLA, BUT CORRECTLY DECIDED THAT ARBITRATOR SABELLA EXCEEDED HIS JURISDICTION AND AUTHORITY AND THAT HIS AWARD DID NOT DRAW ITS ESSENCE FROM THE CONTRACT, CONSISTENT WITH WELL ESTABLISHED LAW AS ENUNCIATED BY THIS COURT AND FOLLOWED BY EVERY CIRCUIT COURT OF APPEALS.

b. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE SABELLA ARBITRATION AWARD DID NOT DRAW ITS ESSENSE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND DID NOT SPECIFICALLY BASE THIS CONCLUSION ON ARBITRATOR SABELLA'S LACK OF REFERENCE TO THIS AGREEMENT.

c. HOLDING THE EMPLOYER LIABLE FOR THE LEGAL CONSEQUENCES OF ITS KNOWING AND INTENTIONAL BREACH OF CONTRACT OVER THE OBJECTIONS OF THE UNION NEITHER CONFLICTS WITH NOR DISREGARDS ANY LEGAL PRINCIPLES ESTABLISHED BY THIS COURT OR ANY OTHER COURT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1314

W. R. GRACE AND COMPANY,
Petitioner,

vs.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, and shows this Court that the Petition for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case should be denied.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the instant case is reported at 652 F.2d 1248 (1981). This opinion reversed the bench ruling of Judge Orma Smith in case EC 79-200-OS-P, which is unofficially reported at 23 FEP Cases 852 (1980).

JURISDICTION

Petitioner W. R. Grace and Company filed its petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit with this Court on January 14, 1982, a copy of which was received by counsel for Respondent on January 18, 1982. Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, and the Federal Law of Arbitration are involved in this case.

COUNTERSTATEMENT OF THE CASE

A. Leading Up To The Decision Of The Fifth Circuit.

During all times relevant and material to the facts of this case, Petitioner W.R. Grace and Company[1] and Respondent Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America,[2] have been parties to a collective bargaining agreement governing the terms and conditions of the Employer's employees at its Corinth, Mississippi facility. The successive collective bargaining agreements have all contained identical provisions regarding seniority rights of employees and a grievance and arbitration procedure.[3]

In 1972, charges were filed with the Equal Employment Opportunity Commission (EEOC), against W. R.

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[1] W. R. Grace and Company will hereinafter be referred to as W. R. Grace, the Employer, or Petitioner.

[2] Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America will hereinafter be referred to as Local Union No. 759, or the Union.

[3] See Appendix pp. 1a-3a.

Grace by two employees claiming that W. R. Grace was guilty of racial discrimination in its hiring and promotion practices. No charges were ever filed against the Union. These charges triggered an investigation by the EEOC which on or about October 5, 1973, resulted in an administrative finding of racial discrimination by W. R. Grace in its hiring and promotion of blacks to particular job classifications. The investigation was expanded beyond the scope of the original charges and resulted in an administrative finding of discrimination on the basis of sex by W. R. Grace in its failure to hire or promote women into production jobs. The EEOC further determined administratively that the departmental and plant-wide seniority system provided in the collective bargaining agreement perpetuated W. R. Grace's past discriminatory employment practices. At no time has there been a finding or determination made by the EEOC or any court that Local Union No. 759 either encouraged or participated in any of the foregoing unlawful employment practices or that the collective bargaining agreement had been negotiated with the intent of perpetuating W. R. Grace's discriminatory employment policies. On December 11, 1974, at the request of the EEOC the Employer voluntarily entered into a conciliation agreement prepared by the EEOC under which the Employer would agree to cease its discriminatory practices. This conciliation agreement specifically resolved the individual race discrimination charges by providing, *inter alia*, back pay, employment, and promotional opportunities. At this point the issue of racial discrimination ceased being a factor in the instant litigation. As a result of the expansion of the investigation beyond the original charges resulting in the administrative finding of sex discrimination, the conciliation agreement went on to provide, by its terms, that the plant-wide and departmental seniority provisions of the collective bargaining agreement between the parties would be abrogated so as not to perpetuate the Employer's past discriminatory practices on the basis

of sex. The Union was invited to join in the conciliation agreement and declined to do so, objecting most strenuously to any changes in the established seniority provisions of the collective bargaining agreement. In the face of these objections, the Employer, nevertheless, signed the conciliation agreement, abrogating the established contract seniority provisions which had long been negotiated and adhered to by the parties. There of course was no legal requirement compelling the Employer to enter into this conciliation agreement. The Employer elected not to attempt to negotiate with the EEOC and the Union toward a less disruptive alternative. The employer, likewise, elected not to challenge the EEOC's determination that it had engaged in illegal employment discrimination on the basis of sex in Court. At this point, the facts clearly demonstrate that the employer unilaterally agreed to breach its own contract to remedy its own unlawful employment practices at no apparent expense to itself, but at the very real expense to its employees and their certified bargaining representative, Local Union No. 759, who had never participated in any illegal employment discrimination, and who had at all times relied upon the seniority provisions negotiated between the parties in the collective bargaining agreement.

Needless to say, the Union refused to execute the concilation agreement, as it had the effect of rescinding the Employer's contractual obligation to its members. Shortly after the execution of the conciliation agreement, W. R. Grace proceeded to lay off more senior employees while retaining junior female employees, pursuant to the terms of the conciliation agreement, and in violation of the established terms of the collective bargaining agreement. Consistent with its earlier announced position, the Union filed grievances on behalf of all employees whose contractual seniority rights had been violated. Upon the Union's insistence that these grievances be arbitrated pursuant to the provisions of the collective bargaining agreement, the Employer brought suit against Local Union No. 759 in the United States District Court

for the Northern District of Mississippi under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (a), seeking to enjoin the Union from processing these grievances under the terms of the contract. The EEOC was joined as a party defendant and counterclaimed and crossclaimed against the Employer and the Union, seeking a declaratory judgment that the provisions of the conciliation agreement superseded the contractual seniority provisions. In *Southbridge Plastics Division v. Local No. 759*, 403 F.Supp. 1183 (N.D. Miss. 1975), the Court rendered a declaratory judgment that the conciliation agreement was binding on all parties, including the Union, that the seniority provisions of the collective bargaining agreement were in conflict with the conciliation agreement, and that the conciliation agreement superseded the conflicting seniority provisions previously negotiated between the Union and the company. The Union, consistent throughout with its earlier announced position, appealed to the United States Court of Appeals for the Fifth Circuit. While this appeal was pending, this Court rendered its decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See also Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). In these decisions, this Court stated that § 703 (h) of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) expressly protected "bona fide" seniority systems, so long as they did not fall within the proviso which prohibits differences in treatment of employees resulting from an intention to discriminate. This Court specifically held in *International Brotherhood of Teamsters v. United States*,

> "[T]he Union's conduct in agreement to and maintaining the [seniority] system did not violate the Title VII."

In accordance with the above decisions of this Court, the Fifth Circuit reversed the District Court in *Southbridge Plastics Div. v. Local No. 759, etc.*, reported at

565 F.2d 913 (5th Cir., 1978). The Fifth Circuit specifically held,

> "[W]holesale destruction of this (seniority) system as authorized by the conciliation agreement cannot be permitted." *Id.* at 916.

The Fifth Circuit further concluded that the Union's counterclaim, "seeking arbitration of all grievances arising out of the Company's breach through its employment of the conciliation agreement, of the seniority provisions contained in the agreement," *Id.* at 917, should be granted. Following rendition of this decision by the Fifth Circuit, the Employer resumed application of the existing seniority provisions of the collective bargaining agreement. Pursuant to the order of the Fifth Circuit, the Employer agreed to arbitrate a grievance involving an employee who had been reduced in grade and then laid off, while junior female operators were retained on the job. This case was submitted to arbitrator Anthony J. Sabella, who found that "[i]t would be inequitable and manifestly unfair . . ." to rule against the Employer, and thus held that the grievance should be denied. Following the Sabella decision, the Union processed three additional grievances to arbitration contending that the Sabella decision was not binding for purposes of the subsequent arbitration because Sabella exceeded his contractual jurisdiction and authority by failing to confine his decision to the "interpretation and application" of the express "provision or provisions" of the contract at issue between the Union and the Employer. The employer participated actively, freely, and voluntarily in the subsequent arbitration proceedings of the grievances before arbitrator Barrett. Arbitrator Barrett ruled against the Employer in these grievances, holding that Sabella exceeded his jurisdiction and authority and that the Sabella award was not bind-

ing on him.[4] Accordingly, Barrett concluded that the Employer violated the seniority provisions of the contract. After participating in the Barrett arbitration, the Employer then brought suit in the United States District Court for the Northern District of Mississippi, pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), to set aside the Barrett arbitration award, contending that Barret acted without jurisdiction and authority, and to enjoin the Union from pursuing similar grievances. The Union then filed a motion for summary judgment on the grounds that the Employer was seeking to vacate the valid and enforceable award of arbitrator Barrett in favor of the invalid and void award rendered by arbitrator Sabella. The Employer responded by filing a counter motion for summary judgment and seeking to enjoin the Union from filing any further grievances arising out of the conflict between the conciliation agreement and the contractual seniority provisions. The District Court granted the Employer's motion for summary judgment and overruled the Union's motion for summary judgment. The Fifth Circuit reversed the District Court and rendered summary judgment for the Union enforcing the Barrett arbitration award.

B. Rationale Of The Fifth Circuit.

In the instant case, the Fifth Circuit determined that while it is the general rule that one arbitrator will follow a prior arbitration award which involves similar

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[4] Article IV, Section 3 of the contract provides:

> "The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement."

facts under the same collective bargaining agreement, it stated that it is equally well recognized that if one arbitration award exceeds the arbitrator's jurisdiction and authority and does not draw its essence from the collective bargaining agreement, it could never be considered binding for purposes of subsequent arbitrations. *See Torrington v. Metal Products Workers*, 362 F.2d 677 (2nd Cir. 1966); *Amalgamated Meat Cutter and Butcher Workmen of North America Dist. Local No. 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973); *San Antonio Newspaper Guild, Local No. 25 v. San Antonio Light Div.*, 481 F.2d 821 (5th Cir. 1973). The Fifth Circuit also recognized arbitration jurisprudence permitting arbitrators to ignore earlier arbitration awards when found to be plainly erroneous. *See Mallinckrodt Chemical Works*, 50 L.A. 933, 935 (1968); *Carbon & Fuel Co.*, 67 L.A. 1038 (1976); *American Smelting & Refining Co.*, 59 L.A. 340 (1972).

The Court recognized that the arbitrator's grant of authority in this case as set forth in Article IV, Section 3 of the collective bargaining agreement is limited:

> "The jurisdiction and authority of the arbitrator of the grievance, and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change or modify any provision of this Agreement."

The Court also cited Article IV, Section 4, which refers to the binding effect of arbitration awards decided by arbitrators "within [their] jurisdiction and authority as specified in this Agreement." Assuming without deciding that the first arbitrator's award would be given "res judicata" effect over subsequent arbitrations if rendered within his jurisdiction and authority, the Court concluded that the earlier Sabella award was not within his juris-

diction and authority, that it was therefore invalid, and that it in no way precluded the subsequent issuance of a contrary award.

The Court concluded that the Sabella award was no bar to the enforcement of the Barrett award on the basis of the sound principles of law enunciated by this Court long ago in *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960):

> "An arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* at 597.

The Court recognized that Sabella expressly stated that the basis of his award was that "it would be unequitable and manifestly unfair" to rule against the Employer, evidencing by its own terms that Sabella acted beyond his jurisdiction and authority in rendering his award, and that accordingly his award did draw its essence from the agreement. The Court cited the fact that Sabella did not refer to any provisions of the collective bargaining agreement between the parties as further supporting its findings based on the express terms of the award, that it did not draw its essence from the contract.

Thus, the Fifth Circuit correctly determined that a second arbitrator cannot be bound by an earlier arbitration award violating the well-established mandates of *Enterprise Wheel & Car.* The Court then considered, having disposed of the Sabella award, whether the Barrett award should be set aside.

The Fifth Circuit recognized that the Barrett award clearly exhibited fidelity to the express provisions of the contract, drew its essence from the collective bargaining agreement, and thus constituted a valid and enforceable award, in the absence of any other considerations. First,

the Fifth Circuit considered the Employer's contention that contract provisions contrary to law are unenforceable, and its contention that the illegality clause contained in Article XIV, Section 7, of the collective bargaining agreement[5] required vacation of the Barrett award. The Employer had contended that the seniority provisions of the contract were unlawful for the period of time the first district court opinion was in effect, thereby rendering these provisions of the collective bargaining agreement inoperative for purposes of the grievance considered by arbitrator Barrett. The Fifth Circuit countered this contention, which at first blush appeared to possess some logical appeal, by pointing out that the law is now and always has been what the highest legal tribunal considers it to be. 652 F.2d at 1255. The Court pointed out that neither its previous ruling in the *Southbridge* case or the Supreme Court's ruling in the *Teamsters* and *Transworld Airlines* cases were prospective in application, but clearly stated that they were interpretations of § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), setting forth the legality of bona fide seniority systems, as the law had always been written. The Court pointed out that it is always the nature of the judicial process that a party obtaining a favorable ruling in a court of initial jurisdiction may well receive an adverse ruling on appeal. And the Court correctly stated that the Employer's good faith or lack of good faith belief in the legality of its position in this case was of no real moment in creating any sort of equitable defense. Thus the Court pointed out that the Union was not its adversary's keeper on appeal, that the Employed bided its time, at its own peril, while the issue of breach of contract was being decided by the Courts.

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[5] Article XIV, Section 7 provides that:

> "In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter exacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

Finally, the Fifth Circuit considered the employer contention that equity and public policy required vacation of the Barrett award in favor of the Sabella award. The Fifth Circuit recognized that one who knowingly and intentionally breaches a contract, runs the risk of having to pay for that breach. Even though a trial court may initially determine that a breach is not unlawful, or is privileged, the breaching party must be deemed to know that it runs the risk of an adverse determination on appeal. Accordingly, the Court stated that Sabella and the Employer's contentions, that to require the employer to face responsibility for its own intentional breach of the collective bargaining agreement is somehow unfair, inequitable and contrary to public policy, would not withstand close scrutiny. Thus, the Court recognized

> "the inequity of the deprivation of the employees entitled by the law of the contract, each to his status and to the wages that go with that satus." 652 F.2d at 1259.

The Court further acknowledged:

> "The employees' conduct throughout these events was impeccably correct. They had not violated Title VII of the statute. They did not agree to the illegal conciliation agreement. Instead, without defying any court order or acting improperly in any way, they pursued their legal rights in court. And they won. . . .
>
> * * * *
>
> Relieving the company of its obligations would simply be saying that the employees, those who had done nothing wrong and were correct in the law, must bear the financial loss, and those who did violate the law and later followed a course of conduct which, while in good faith, was not authorized in the law are excused from financial responsibility. The injustice, unfairness, and violation of public policy of such a conclusion would indeed be shocking.

> The equities are on the side of those, the employees and their representative, who have not violated any law, even in good faith, who have pursued their rights in accordance with the law throughout this entire proceeding, and whose rights were vindicated in this Court and in arbitration." *Id.*

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Revised Rules of the Supreme Court of the United States, review on writ of certiorari is not a matter of right, and will be granted only when a very substantial showing has been made that there are special and important reasons therefor.[6] Petitioner, which has twice been unsuccessful before the United States Court of Appeals for the Fifth Circuit, has attempted to invoke the jurisdiction of this Court by maintaining that the decision of the Circuit Court of Appeals below is in conflict with decisions of this Court and other Circuit Courts of Appeals.[7] With all due respect, Petitioner totally fails to demonstrate any conflicts with this Court or any Court of Appeals, nor does Petitioner demonstrate any important question of federal law which has not been, but should be, decided by this Court. Petitioner attempts, by mischaracterizing the findings and conclusions of the Court below, to create the requisite conflict between the circuits and this Court to fulfill the requirements of Rule 17. Petitioners efforts are totally unavailing. The Court below has spoken and

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[6] Certiorari is granted only in cases involving

> principals the settlement of which is of importance to the public as distinguished from parties and in cases where there is a real and embarrassing conflict of opinion in authority between the courts of appeals. *NLRB v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502 (1951), citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393.

[7] *Ivory Novelties Trading Company v. Coty*, 262 U.S. 159 (1923); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (189).

Petitioner lost. It is not now appropriate to have this Court reexamine the Fifth Circuit's findings of fact or to ask this Court to substitute its judgment for the judgment of the Court below in this regard. It is not the obligation of this Court to sit as a court of original jurisdiction and to grant hearings *de novo* on findings of fact.[8]

Accordingly, as more specifically set out below, the requisite showing for granting the writ not having been made, the petition herein should be denied.

a. THE FIFTH CIRCUIT DID NOT DECIDE THE MERITS OF THE DISPUTE BEFORE ARBITRATOR SABELLA, BUT CORRECTLY DECIDED THAT ARBITRATOR SABELLA EXCEEDED HIS JURISDICTION AND AUTHORITY AND THAT HIS AWARD DID NOT DRAW ITS ESSENCE FROM THE CONTRACT, CONSISTENT WITH WELL ESTABLISHED LAW AS ENUNCIATED BY THIS COURT AND FOLLOWED BY EVERY CIRCUIT COURT OF APPEALS.

The Fifth Circuit's decision in *Southbridge Plastics* stated, pursuant to this Court's decision in *International Brotherhood of Teamsters v. United States*,

> "Finally having determined that the Company and the EEOC have not shown the seniority system to violate Title VII, that system, as part of the binding agreement between the Company and the Union, must control here. Accordingly, pursuant to the agreement, we grant the Union its counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement." 565 F.2d at 917.

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[8] *National Labor Relations Board v. Waterman S. S. Corp.*, 309 U.S. 206 (1940); *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938); *United States v. Johnson*, 268 U.S. 220 (1925).

The Fifth Circuit thus decided in the *Southbridge Plastics* case that the contractual seniority provisions constituted a bona fide seniority system and expressly declared this system legal within the meaning of Title VII. The Fifth Circuit dissolved the injunction against arbitrating grievances under the contract, and stated that the Union had legally enforceable rights to assert under the bona fide seniority provisions of the contract. A clearer statement could not be made. Thus petitioner's reference to this part of the earlier decision as a "cryptic statement" at page 8 of its petition is a bit puzzling. Accordingly, petitioners statement of its first reason for granting the writ in this case is misleading and inaccurate characterization of the Fifth Circuit below. The Fifth Circuit having determined that the contractual seniority provisions were valid in *Southbridge Plastics*, the employer can hardly contend that conducting layoffs in accordance with the conciliation agreement, thus necessarily in controvention of the contract, constituted anything but a breach of contract. This determination does not require sophisticated legal analysis and lengthy citation of case law, it merely requires the application of logic and common sense. Having declared what the law is, contrary to what petitioner would have this Court rule, the Fifth Circuit could hardly recognize as valid, an attempt by an arbitrator to reverse by fiat, what the Court itself had already established as the law. In addition to constituting an invasion of the province of a judiciary, that is, to declare what the law is, *see Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), Sabella's award failed to draw its essence from the contract and expressly evidenced a clear "infidelity" to his obligation to interpret and apply the provision of the collective bargaining agreement in this case. This is true particularly in this case where there is a restrictive arbitration clause in the contract which requires that the arbitrator of a grievance

> "shall be confined *exclusively* to the interpretation and application of the *express* provision or provisions of this agreement. . . . He shall *have no authority* to add to, adjust, change, or modify any provision of this agreement [Emphasis added]."

In view of this fact, when an arbitrator resolves a grievance on the basis that "it would be inequitable and manifestly unfair to penalize the employer . . . .", it is abundantly clear, that under the test enunciated in *Enterprise Wheel & Car Corp., supra*, the arbitrator has exceeded his jurisdiction authority and that his award is invalid and of no legally binding force or effect. This is the law as decided by this Court many years ago, and petitioner cannot point to a single decision of this Court or a single decision of any Court of appeals that is in conflict. The Fifth Circuit recognition that the Employers application of the conciliation agreement which by its terms abrogated the parties collective bargaining agreement constituted without question a breach of contract was no more than recognition of a logical truism. Petitioners contention that this constituted an invasion of the arbitrators province of deciding the merits of grievances is a bogus contention which begs the real issue in this case—that is, simply stated, which of the two conflicting arbitration awards draws its essence from the contract, and thus, should be enforced.

b. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE SABELLA ARBITRATION AWARD DID NOT DRAW ITS ESSENCE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND DID NOT SPECIFICALLY BASE THIS CONCLUSION ON ARBITRATOR SABELLA'S LACK OF REFERENCE TO THIS AGREEMENT.

The invalid Sabella award by its own terms, expressly demonstrates that it is not supported by any provision of the collective bargaining agreement, and fails to draw its essence therefrom. Contrary to the assertions of Petitioner, the Fifth Circuit did not base its determination

solely on the fact that Sabella did not refer to any provisions of the collective bargaining agreement in his award. Thus, petitioner's statement of its second reason for granting the writ is a misleading and inaccurate characterization of the decision of the Fifth Circuit below. The Court relied on the express terms of the award as announced by Sabella himself, that being, "it would inequitable and manifestly unfair . . . ." There is no basis in the contract whatsoever, particularly in view of the narrow and precisely worded delineation of the jurisdiction and authority for arbitration set forth in the contract, to permit arbitrators to constitute themselves Lord High Chancellor in the Court of Equity. As this Court held in *Enterprise Wheel*, ". . . an arbitrator is confined to interpretation of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[9] Thus the Fifth Circuit does not hold that labor arbitration awards are invalid for failure to refer to specific contractual provisions, as Petitioner would have this Court believe, rather the Fifth Circuit clearly stated, on the basis of its findings of fact, that an award which fails to draw its essence from a contract, an award which manifests an infidelity to this arbitrator's obligation to interpret and apply the contract, thus an award which is beyond the jurisdiction and authority of an arbitrator, is invalid. This has always been the law. *Enterprise Wheel & Car Corp., supra.*

The argument that the Sabella award was supported by the illegality clause in the contract is an exercise in sophistry in the extreme. It is well established, as held by the Fifth Circuit, that the law is what the highest tribunal which considers an issue decides the law to be. In view of this fact, incredibly Petitioner would have this Court endorse the following proposition:

> "During the pendency of administrative and judicial determinations of illegality, the illegality clause had

[9] 363 U.S. 597.

> relieved the Company of any obligation to apply the seniority provisions and that this resulted not because the provisions were in fact illegal under the 'true' law but because the parties had intended the illegality clause to operate during the pendency of even erroneous determinations of illegality." Petition at pp. 13-14, n.16.

This postulate of jurisprudence, particularly in view of the fact that the employer, knowingly and intentionally by its own act, abrogated the express provisions of its contract with its employees, thus generating the dispute between the "true law" and the "erroneous determinations of legality," is hardly worthy of being dignified by a response.

Petitioner correctly states that a majority of the circuits have held that arbitration awards will be enforced as long as it is possible for the reviewing court to find a rational basis to support them in their respective collective bargaining agreements (merely a restatement of the requirement that an award draw its essence from the contract). However, there is nothing in this decision of the Fifth Circuit herein which conflicts with this statement of the law, rather, the decision below is completely consonant with the extensive case law cited by Petitioner. Petitioner merely seeks to quibble with the findings of fact of the Fifth Circuit which are more than substantially supported by the record evidence. The Sabella award, plain and simple, failed to draw its essence from the contract and was thus an invalid award. In fact, the result sought by petitioner would establish a new rule of law very much in conflict with existing authority whereby the Supreme Court is to make an independent review of the findings of fact of the courts of appeals, substitute its judgment for the judgment of the courts of appeals in making their factual determinations, and thus permit litigation *de novo* of all factual issues determined by the court below. Rule 17 of the

Supreme Court rules and the decisions of this Court, of course, require a contrary approach.[10]

The Fifth Circuit correctly decided that the Sabella award failed to draw its essence from any provision of the collective bargaining agreement and this conclusion is consistent with the decisions of this Court and all other courts.

c. HOLDING THE EMPLOYER LIABLE FOR THE LEGAL CONSEQUENCES OF ITS KNOWING AND INTENTIONAL BREACH OF CONTRACT OVER THE OBJECTIONS OF THE UNION NEITHER CONFLICTS WITH NOR DISREGARDS ANY LEGAL PRINCIPLES ESTABLISHED BY THIS COURT OR ANY OTHER COURT.

Petitioner's third stated reason for granting the Writ begs the ultimate question, which is, not whether, but who must bear the loss in this case. Moreover, petitioner's contention that the decision of the Fifth Circuit below disregards legal principles established by this Court and conflicts with decisions of other circuits is just not true. Contrary to the assertions of the Petitioner, the employer was not required to enter into a conciliation agreement by the EEOC, but did so knowingly and intentionally over the vociferous objections of the Union. The employer did not contest either the EEOC's administrative determination that probable cause existed to believe that it had engaged in unlawful practices, nor its determination that the conciliation agreement was appropriate in the circumstances; the employer could have attempted to negotiate with the Union and the EEOC concerning the terms of a conciliation agreement so as not to abrogate the contractual seniority provisions, or could have resisted the EEOC altogether and obtained a judicial determination of the

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[10] *See* cases cited at notes 6 and 7, *supra*, and accompanying text.

rights and liabilities of the parties. W. R. Grace elected voluntarily not to follow either of these courses. Instead, W. R. Grace acted unilaterally to shift the burden of its discriminatory employment practices to its employees and their certified bargaining representative who had been innocent and faultless throughout. The Employer, of its own free will, elected to place all its legal eggs in one basket, and unfortunately for the Employer, chose the wrong basket. Petitioner's contention that somehow it has been prejudiced in these proceedings, by contending that it was under legal obligation to abide by the decision of the District Court in the initial litigation is particularly unimpressive. Petitioner was not out of the blue directed to take some action by court order, rather petitioner took an overt unilateral action in violation of its contractual obligation to its employees and their bargaining representative freely and voluntarily, and then went into federal district court to obtain judicial blessing of its predetermined stance. The decision of the Fifth Circuit is thus clearly not in conflict with any decision cited by Petitioner, any other decision announced by this Court, or any other court. The cases relied upon by Petitioner, particularly the cases cited by petitioner involving damages sustained by the wrongful issuance of an injunction, are, plain and simple, inapposite on their facts.

Petitioner errs with its contention that this case is in conflict with the holding of the United States Circuit Court of Appeals for the Ninth Circuit enunciated in *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981), and the United States District Court, Eastern District of Michigan's decision in *Local 223, Utility Workers Union of America v. The Detroit Edison Co.*, Case No. 81-70694 (1981).[11] *Dennison* is clearly distinguishable on the facts and *Local 223* cites *Dennison* and the instant case and expressly concludes that *Den-*

[11] See Appendix pp. 14a *et seq.*

nison is distinguishable from the instant case and that *Dennison* and not the instant decision of the Fifth Circuit controls it on the facts. Thus *Local 223* not only distinguishes *Dennison* and the instant case, but also harmonizes the subject cases.

In *Dennison*, an employee brought suit against the City of Los Angeles Department of Water and Power on behalf of himself and similarly situated minority employees alleging that the hiring and promotion policies discriminated on the basis of race and national origin. In contrast to the current case, the *Dennison* case involved an actual court suit and the issuance of a consent decree providing, in part, for an affirmative hiring and promotion plan of limited duration on behalf of all identifiable past applicants. The district court in *Dennison* conducted a fairness hearing allowing all persons objecting to the entry of the consent decree to argue their objections. The Union had an opportunity to intervene in *Dennison* from the beginning, but chose only to appear and present objections at the fairness hearing. The district court later approved the consent decree. Subsequent to the entry of the consent decree, two nonminority employees were denied promotions and filed charges with the EEOC. Upon issuance of a right to sue letter, these employees, along with the Union, initiated suit against the employer. The District Court granted the employer's motion for summary judgment and the Ninth Circuit affirmed, but only on the narrow ground that the later lawsuit was an impermissable collateral attack on the consent decree. In contrast to the instant case, as noted by the Ninth Circuit, the Union in *Dennison* had sufficient opportunity to intervene in the original proceedings, but chose not to. *Dennison* is further distinguishable from the instant case in that there was no subsequent appeal of the initial district court determination reversing same, nor a subsequent determination that the employer's actions were in contravention of a bona fide seniority system contained in a

collective bargaining agreement. Furthermore, the *Dennison* case, as it involves a collateral attack on a prior court judgment, is not at all apposite to a direct judicial determination, on the issue of the enforceability of an arbitration award. The *Dennison* case was expressly decided on very narrow grounds, and did not decide any issue relevant to the instant case. Thus the *Dennison* court held,

> "Because the IBEW's suit is barred as an impermissable collateral attack on a consent decree, we need not consider the merits of awarding damages to non-minority employees adversely affected by the adoption of an affirmative action plan." *Id.* at 696.

In *Local 223, Utility Workers of America v. The Detroit Edison Co., supra*, the District Court found that the instant case and the *Dennison* case were distinguishable because the employer in *Dennison* acted to the detriment of employees only after institution of a court order whereas the employer in the instant case voluntarily breached its contract with its employees to their detriment on the basis of a conciliation agreement alone. In response to the contention that awarding damages for breaches of contract arising out of implementation of affirmative action plans is contrary to public policy and discourages the remedying of discriminatory employment practices, the *Local 223* court made a clear distinction between affirmative action plans adopted pursuant to court orders and those adopted pursuant to conciliation agreements. Thus the court stated:

> "I do believe that a good argument can be made against applying this sort of situation to a conciliation order voluntarily entered into. I don't think somebody should be able to make one contract and then make another contract and use the second contract they entered into voluntarily as an excuse for breaching the first contract.
>
> If that slows down the conciliation process that's tough because otherwise the conciliation process has

> too much potential, pretty soon it will be, 'Which way do we get out of this cheapest', not 'Which way is best or right'." [12]

The *Local 223* court determined that that case was analogous to the *Dennison* case and not analogous to the instant case, and for this reason ruled against the Union.

The Fifth Circuit correctly decided that holding the employer liable for the legal consequences of its knowing and intentional breach of contract and this decision does not disregard legal principles established by this Court, nor does it conflict with any decisions of any other circuit court of appeals, or district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: February —, 1982

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[12] See Appendix pp. 15a, 16a.

APPENDIX

ARTICLE IV

PROCEDURE FOR HANDLING GRIEVANCES

1. For the purpose of this Agreement, a grievance is defined as a difference of opinion between the Company and the Union, or between the Company and an employee covered by this Agreement, with respect to the meaning and application of the terms of this Agreement.

a. FIRST STEP:

Any employee who has a grievance shall within four (4) working days after the occurrence of the matter complained of submit his grievance in writing to either his foreman or the department manager. This shall be done in person or through his department steward. Upon submission of the written grievance, a conference will be held in the office of the foreman or department manager for the purpose of discussing said grievance. Such meeting will be held between the grievant, his department steward, the foreman, and the department manager. The foreman or department manager shall provide a written answer to the grievance within three (3) working days after the meeting. Should the first step answer be unsatisfactory, the Union may appeal the grievance in writing to the next step within three (3) working days after receipt of the Company's answer or the matter will be considered to be settled.

b. SECOND STEP:

(1) If the grievance is not settled in Step 1, then such grievance shall be taken up between the Company and Union at their regular bi-monthly grievance meeting. The Company must submit its answer within five (5) working

days after the close of the second step meeting. If the grievance is not resolved, then the Union shall have ten (10) days in which to appeal, in writing, the grievance to arbitration.

(2) Joint meetings shall be held by the Company and Union on the second and fourth Wednesday, and Friday, if necessary, of each month beginning at 1:00 p.m. at a mutually agreeable location. Special meetings may be held upon notification of either party of their desire to meet as soon as it is reasonably possible.

2. SELECTION OF ARBITRATOR:

a. The parties agree to select an impartial Arbitrator from a permanent Arbitrators' panel which will be composed of seven (7) Arbitrators selected by mutual agreement and made a part of this Agreement.

b. When an Arbitrator is required from the permanent Arbitrators' panel the parties may either select the Arbitrator by mutual agreement or by alternately striking names from the permanent Arbitrators' panel until one name remains who will be designated as the Arbitrator. The right to strike the first name will be decided by a flip of a coin. Should the Arbitrator first selected be unable to hear the grievances then another Arbitrator shall be selected in the manner prescribed above.

3. ARBITRATOR'S AUTHORITY

The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement.

4. ARBITRATOR'S DECISION:

The Arbitrator's decision shall be made within thirty (30) days after the dispute has been heard unless additional time is requested by the Arbitrator and mutually agreed upon by the Company and the Union. The decision of the Arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company. The decision of the Arbitrator shall be complied with within ten (10) days after receipt of the decision, unless additional time is requested and approved.

5. ARBITRATOR'S EXPENSE:

The expense and remuneration of the Arbitrator shall be borne equally by the Company and Union. The Company shall not be responsible for the wages or expenses of any individual acting as agent for, or witness in behalf of, the Union in any dispute carried beyond the Third Step of the Grievance Procedure.

6. SPECIAL PROCEDURE FOR HANDLING DISCHARGES:

a. No employee, other than a probationary employee, shall be discharged without first being suspended from work with view of discharge. The suspended employee shall leave the plant immediately upon his suspension. The Company shall give prompt notice of its action to the Union and any dispute about the existence of just cause shall promptly be presented to the Industrial Relations Director.

b. If the dispute cannot be settled informally it may be submitted as a grievance directly at the third step of the grievance procedure. The grievance must be filed by either the employee or the Union within five (5) regular work days from the date of notice to the Union of the Company's final action.

7. GENERAL PROVISIONS:

a. If it is determined in the grievance procedure that an employee has been unjustly discharged or suspended the employee shall be reinstated to his former job and shall be compensated at his regular hourly earnings for the time lost less any penalty time decided upon.

b. The time limits as set forth in the grievance procedure may be extended by mutual agreement of both parties.

c. In the event that it becomes necessary for a Union representative to leave his place of work for the purpose of investigating a grievance in a department or departments over which he has jurisdiction, or to attend to Union business, he will report to his foreman and advise him of his destination. In the event that the representative is on a job that affects the production of an employee or group of employees, the foreman shall make the necessary arrangements to relieve the representative. The representative will remain on the job until such arrangements can be made, provided same are made within a reasonable time. He shall report to his foreman immediately upon his return.

d. All time lost from work by Union Representatives investigating or handling grievances shall be paid for by the Company at the employee's regular hourly rate.

e. Upon request of the Union an International Representative will be permitted to participate in negotiations and arbitration commencing at the step between the Union and the Company's Plant Manager and Personnel Department; and the Company or Union may be represented by such parties as it selects, including counsel.

f. No investigating or processing of grievances shall take place during overtime hours, except with respect to an act occurring during the overtime in which the investigating or processing is done.

ARTICLE VIII
SENIORITY

Section 1—Definition and Purpose

1. Seniority is preference or priority measured by length of service with definite rights qualifying for employment when work is available, the purpose of which is to provide a declared policy of work security measured by length of service subject to the limitations set out in this Agreement.

2. New employees shall have no seniority rights until they have completed a probationary period of thirty (30) working days, after which their seniority shall extend back to date of hire. The Company shall have the right to layoff, terminate or discharge the service of new employees at its discretion without recourse.

3. Time off the payroll shall be counted as continuous service without deduction of time and when an employee is either sick or injured, on leave of absence in accordance with this Agreement, laid off, serving in the Armed Forces, or while on leave of absence prior thereto.

Section 2—Promotions

1. Whenever a new job is created, or a vacancy occurs on an established job, the Company shall post a notice on a designated bulletin board for bids as follows:

a. Vacancies occurring in Production Labor Grades 4 through 7, Maintenance Department Classifications A, Laboratory Technicans other than trainees: The notice shall be initially posted in the Department where the vacancy occurs.

b. All other vacancies: The notice shall be initially posted on a designated central bulletin board for plant wide bids.

The notice shall contain a description of the jobs and the hourly rate of such job. The notice shall remain posted on the bulletin boards for a period of twenty-four (24) hours.

2. When such jobs are posted employees wishing to make application shall sign the notice. Employee's whose names remain on the notice at the end of the official posting period shall be considered for the job and, should they be the successful bidder, must accept the job.

3. After the posting has elapsed the opening shall be awarded to the employee making application with the greatest amount of seniority who can qualify.

4. The successful bidders in accordance with paragraph three (3) of this Section shall be transferred to such opening not later than the beginning of the pay period next following end of the posting period or as soon thereafter as possible, except for jobs requiring long or special training.

5. A successful bidder chosen in accordance with paragraph three (3) above shall be regarded as on trial for a period of thirty (30) days, normally, but not to exceed sixty (60) days. Upon failure of the employee to satisfactorily complete the trial period, he shall be returned to his former job unless agreed otherwise between the Company and the Union. Vacancies created by this clause shall be posted for bid again.

6. Job vacancies created by employees bidding on jobs must not exceed two (2) plant wide postings in any one chain. Any vacancy created after two (2) plant wide bids are allowed shall be filled from any source including new hires.

7. Whenever an employee is a successful bidder for a job, he shall not be allowed to bid on another job for six (6) months thereafter, except he may bid on jobs in higher labor grades in his assigned department.

8. A successful bidder for a job in another department shall not be allowed to bid on another job for six (6) months, except he may bid on new jobs being created or added to his assigned department without regard to the six (6) month restriction.

Section 3—Shift Preference

1. Employees working on the same job shall be given preference in accordance with their plant wide seniority except for training and temporary periods.

2. An employee may exercise his shift preference within his established job; however, if he does not have seniority within his established job on the shift of his choice, he may bump downward to a job in a lower labor grade within his assigned department, in order to obtain the shift of his preference. An employee exercising shift preference to a job in a lower labor grade under this provisions, however, must remain on his assigned job until such time as a suitable replacement is obtained and properly trained to take his place.

3. Employees exercising shift preference shall remain on their selected shift for a six (6) month period. This shall not prevent the changing of shifts between employees by mutual agreement, so long as the foremen of the shifts approve.

4. All new employees shall be placed on their respective shifts as soon as they can perform the job without assistance or within thirty (30) days from hiring date.

Section 4—Layoffs and Recalls

1. Whenever a reduction in the work force is necessary, the Company will notify the affected employees at least three (3) working days before the layoffs are to become effective, or grant three (3) days pay in lieu thereof at the employee's regular hourly rate of pay. This paragraph shall not apply to layoffs of seven (7) calendar days or

less, in which case no notice will be required and no layoff pay shall be involved; however, the Compuany agrees to use its best effort to give advance notice to employees of layoffs of seven (7) calendar days or less; such notice will be posting, or verbal, within the discretion of the Company. Notice of layoffs of more than seven (7) calendar days shall be by posting.

2. In the event of a reduction in the work force in a department, employees who can qualify will bump less senior employees within the department in all labor grades except those excluded in Section IV, paragraph 3 (a), and may bump those employees in the excluded jobs in paragraph (a), if qualified.

3. Any openings which exist in labor grades 1, 2, 3, 4, or 5 will be filled by employees who can qualify based on seniority and preference. If no job openings are available within other departments, employees who can qualify will replace employees in other work classifications in labor grades 1, 2, 3, 4, or 5 based on seniority and preference, and may bump less senior employees in jobs listed in paragraph (a) if qualified. The affected employees will be laid off in accordance with their plant wide seniority, the youngest employee in point of service shall be laid off first.

a. Certain jobs require extra long or special training. The Company need not transfer to or layoff from such jobs, any employee, except in those cases where the transferee has previously qualified for such job. These jobs are Maintenance A jobs, Production jobs in Labor Grades 6, 7, Design/ Development Operators, Color-Weigher, Pre-Mix Operators; Laboratory Technicians at Maximum rate. An employee can bump a junior employee in the above jobs if qualified.

4. When increasing the work force in the plant, the Company shall recall employees at follows:

a. An employee forced off his job due to a previous reduction in force and working on another job in the plant shall be returned to any opening which may occur in his former department in labor grades 1, 2, 3, 4, or 5 who can qualify in accordance with plant wide seniority.

b. The Company shall then recall employees who can qualify in accordance with their plant wide seniority based on his preference for jobs in labor grades 1, 2, 3, 4, or 5, and qualifications in jobs listed in Section 4, paragraph 3(a). In order to exercise preference an employee must present himself in the Personnel Department no later than as scheduled on the last working day prior to the recall. Any employee may exercise other provisions of this contract as provided for to change from the job he is on after recall; however, by voluntarily changing jobs such employees shall lose recall rights to his original department.

5. Notice of recall shall be sent by certified mail, return receipt requested, to the employee's last address listed in the Company's files. The employee shall have three (3) days after receipt of notice of recall, or after the date which a notice of recall was delivered to last address, whichever is the shorter period, in which to notify the Company of intent to return to work, and if the employee is not employed at the time of recall he shall return to work within th period indicated, but if he is employed at the time of recall he shall have ten (10) days after receipt of notice of recall, or after the date which a notice of recall, sent by registered mail, was delivered to his last address, to return to work.

6. Employees shall be recalled as herein provided for, with the understanding, however, that in cases of layoffs and recalls the Company may disregard seniority, if it is necessary to fill a particular job which, if left open, would curtail or prevent the employment of other employees.

7. Employees shall be paid the regular rate of the job to which they are transferred to or called back to under the provisions of this Agreement.

8. The Company shall be the sole judge in determining when to increase the work force in the plant and the number of employees to recall from layoff.

9. Temporary Layoff

This provision is intended to be used to cover short term emergency or unusual situation such as major equipment breakdown, material shortage, Acts of God and short cycles scheduling imbalances due to customer demand.

When a short term work force reduction is required affecting either part or all of a department(s) the following procedure will apply:

Temporary Layoff of No More Than Four (4) Weeks

Any jobs that remain in the department will be filled based on qualifications and seniority for jobs listed in Section 4, paragraph 3(a) and seniority and who can qualify for all other jobs. Employees required to leave the department will displace the least senior plant employees and will have preference of jobs available based on qualifications and seniority.

When the plant is operating under a short work week situation and it becomes necessary to complete the week for any department the employees in that department will be scheduled.

Section 5—Transfers

1. An employee permanently transferred from one job to another, including jobs in different departments shall receive the pay of the job to which he was transferred.

Section 6—Leaves of Absence

1. Any employee covered by this Agreement who leaves the employment of the Company to enter the Armed Forces by draft under the Selective Service and Training Act, or any other similar Federal legislation which may be passed, shall be granted a leave covering such absence. The Company will comply with all applicable laws relating to the reinstatement of such employees. The Company and the Union shall comply in all respects with the laws applicable to Military Training Service and re-employment.

a. Employees who are members of the National Guard or Reserve components of the U.S. Armed Forces shall be granted an automatic leave of absence to participate in scheduled training periods as outlined under Federal and State Laws. Such leave shall not be counted as days of absence from employment in determining entitlement to vacation pay, holiday pay or any other benefit under the provisions of this contract.

2. An employee who becomes ill or is injured and whose claim of illness or injury is supported by satisfactory evidence shall be granted a leave of absence not to exceed three (3) years to cover the period of such illness. Seniority shall accumulate during period of such leave.

3. An employee seeking election for or elected to any public office in City, County, State or Federal Government shall be granted a leave of absence as required for campaigning up to ninety (90) days, or for his tenure in office. Seniority shall accumulate during period of such leave.

4. An employee elected or selected for duty as an officer, representative or employee of the Local Union or the International Union, the AFL-CIO as such, or for any State, County, City or any Local Union Council of the AFL-CIO, which assignment will take him from his

employment with the Company, shall upon written request of the Union or International Union receive a leave of absence. Seniority shall accumulate during such leave of absence.

5. An employee wishing a leave of absence for a period of more than two (2) weeks shall make application to the Industrial Relations Department, where it will be considered on its merits and the Company's ability to grant said leave. If granted, such leave shall be in writing and a copy furnished the Union. A leave of absence will normally not exceed thirty (30) days and under no circustances ninety (90) days. A leave of absence will not be granted for self-employment, or employment elsewhere. A person on leave must return by the expiration date of the leave and upon reinstatement shall, consistent with his seniority, be placed on his previous or comparable work.

6. An employee upon written request shall be granted a leave of absence for pregnancy consistent with all Federal and State laws and regulations. Seniority shall accumulate during such leave of absence.

7. An employee accepting a position outside the bargaining unit shall continue to accumulate seniority. If he is returned to the bargaining unit by mutual approval of the Union and the Company, he shall be placed on a job vacancy consistent with his seniority. If no vacancy exists, he shall replace the employee with the least seniority, if he has more seniority; the seniority referred to being on a plant wide basis.

Section 7—Termination of Seniority

1. Employees' seniority shall terminate:

   a. Upon discharge for cause.

   b. Upon voluntary termination of employment (quit).

c. Upon failure to return to work following layoff within the time provided therefor as specified in Article VIII, Section 4, paragraph 5 hereof.

d. Absence from work for three (3) consecutive days without a reasonable excuse. The burden of proof rests with the employee.

e. Upon failure to return to work within ten (10) days after expiration of a leave of absence.

f. By engaging in gainful occupation while on leave of absence, unless leave was granted for such purpose.

g. Upon layoff for a period in excess of two (2) years.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 81-70694

LOCAL 223, UTILITY WORKERS UNION OF AMERICA,..
Plaintiff,

v.

THE DETROIT EDISON COMPANY,
Defendant.

Opinion of the Court in the above-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, December 11, 1981.

APPEARANCES:

ROTHE, MAZEY, MAZEY & HAMBURGER, P.C.
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Appearing on behalf of Plaintiff.

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Legal Department, Detroit Edison Company
ROGERS & WELLS,
STANLEY GODOFSKY, Esq.,
New York, New York

Appearing on behalf of Defendant.

DEBRA MILLENSON, Esq.
Washington, D.C.

Appearing on behalf of Intervenor EEOC.

[2] Detroit, Michigan

December 11, 1981

* * * *

THE COURT: Mr. Mazey, I appreciate your position. I appreciate all of your positions.

The first thing, I guess, I granted the motion to intervene. In this case, as I see it, the Detroit Edison Company was ordered to grant in effect some seniority to some persons on the basis of discrimination. It never was determined there was not discrimination. What the Supreme Court set aside was the remedy. I think that is important to remember.

The Detroit Edison Company resisted it all the way, tried to get a stay, went to the Supreme Court and eventually was successful, but in the meantime in compliance with an order which they had to do or would have been in contempt otherwise, they had absolutely no choice about it. The very Supreme Court that set aside the order would have, I have no question at all, upheld the contempt citation against the Detroit Edison for non-compliance and probably granted damages to boot.

In the meantime Detroit Edison Company in carrying out the order took action which would have constituted a breach of contract and probably did, but at [3] least it would have if they had done it voluntarily. It's as simple as that.

The EEOC comes in and argues to allow the payment of damages under these circumstances would be disastrous to the whole structure because it would discourage every single kind of consent judgment in which this kind of relief was granted. I do believe that a good argument can be made against applying this sort of situation to a conciliation order voluntarily entered into. I don't think somebody should be able to make one contract and then make another contract and use the second

contract they entered into voluntarily as an excuse for breaching the first contract.

If that slows down the conciliation process that's tough because otherwise the conciliation process has too much potential, pretty soon it will be, "Which way do we get out of this cheapest" not "Which way is best or right."

But I do really believe that what the Detroit Edison Company did here they did under compulsion. They fought it all the way and it would be contrary to public policy to permit, for the Court to lend its hand, if you will, whatever they do I'm not talking about, but for the Court to lend its hand or order the Detroit Edison Company to submit to arbitration which could cause them [4] to pay out money for compliance with a valid—valid, no—an enforceable court order, and that is the bottom line of this lawsuit.

If we must distinguish between Dennison and Grace, I think the Dennison court is a very reasoned opinion. I think the Grace case can be differentiated because there wasn't the same resistance in the Grace case that we have in The Detroit Edison Company here.

Therefore, with real concern for the fact that I think some innocent people here, at least people who had not done anything wrong, they are not getting relief from the wrong done them, but I grant the Edison Company's and intervenor's motion for summary judgment and dismiss the case.

It's an extremely important case. It's a well-argued, well-reasoned case on both sides. I'm not unsympathetic with the fact that there was some language in Judge Keith's opinion which I am sure is in good faith. I am sure we all say things that are not totally accurate. I think that Judge Keith probably erred in suggesting that arbitration was available when in fact it's not, but that is the way the chips fall.

Thank you for coming in today.

MR. SLAZINSKI: Thank you.

[5] CERTIFICATE

I, Donald E. Miller, Official Court Reporter, hereby certify I reported in shorthand the proceedings had in the within-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, December 11, 1981, and that the foregoing is a full, true and correct excerpt of the proceedings taken at said time and place.

/s/ Donald E. Miller
DONALD E. MILLER
853 Federal Building
Detroit, Michigan 48226
226-3680

Dated: February 12, 1982

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
Clerk

No. 81-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

W. R. GRACE AND COMPANY,
Petitioner,
v.
LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

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1. In its Brief in Opposition To Petition For Writ of Certiorari (hereinafter "Opposition Brief"), the Respondent ("the Union") implies that all layoffs which were the subject of the arbitration awards in dispute occurred after W. R. Grace entered into a conciliation agreement with the EEOC but before the District Court ordered the Company to comply with the provisions of that conciliation agreement. Apparently, by so constructing the facts, the Union seeks to convince the Court that W. R. Grace intentionally breached its collective bargaining agreement by laying off employees pursuant to the EEOC conciliation agreement, that that "breach" was complete before any District Court action in 1975, and that the District Court decision in 1975 did nothing more than inform the Company that its earlier actions were

correct.[1] Accordingly, so the Union's argument goes, when that District Court decision was found to be erroneous by the Fifth Circuit in 1978, the Company could be held liable for all the damages accruing from that breach.

The problem with the Union's argument is that it does not state all the facts, for by far the largest number of layoffs involved in the instant case occurred after the District Court enjoined the Company from applying the seniority provisions of its labor contract.[2] Although it is true that a few employees were laid off prior to the District Court order, it was the Union's objection to the Company's application of the conciliation agreement which prompted the Company to ask the District Court

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[1] Thus, at pages 4-5 of its Opposition Brief, the Union states that layoffs occurred shortly after execution of the conciliation agreement and that a dispute over those layoffs led to the 1975 District Court action, thus erroneously implying that these pre-District Court order layoffs are the only ones now in issue. Further, at page 19 of its Opposition Brief, the Union states that the Company "was not out of the blue directed to take some action by court order, rather [the Company] took an overt unilateral action in violation of its contractual obligation to its employees and their bargaining representative freely and voluntarily, and then went into federal district court to obtain judicial blessing of its predetermined stance." As we point out below, however, these assertions are erroneous.

[2] In its original motion for summary judgment in the instant case, the Company distinguished the pre-court order layoffs and post-court order layoffs, arguing that that part of the Barrett arbitration award regarding the pre-order layoffs conflicted with the policies underlying Title VII and that that part of the Barrett award regarding the post-order layoffs violated not only Title VII policies but also the great body of law and public policy mandating adherence to all court orders. However, the Union, the District Court and the Fifth Circuit consistently dealt with all layoffs as if they occurred while the District Court order was in effect. Accordingly, it is a little late for the Union now to be contending that any distinction is relevant, much less suggesting that all layoffs occurred prior to the District Court's ruling.

for a judicial determination of whether the Company should lay off employees according to the conciliation agreement or the allegedly unlawful contractual seniority provisions.[3] The Company was ready to do whatever the District Court ordered, and it left to the Union and EEOC the vigorous litigation of the legality of the contractual seniority provisions. When the District Court gave its answer in November 1975 and ordered the Company to follow the conciliation agreement, the Company made all future layoffs between November 1975 and January 1978 (when the District Court order was vacated) according to the conciliation agreement. It was these layoffs that later became the subject of the Sabella arbitration award and the major subject of the Barrett award.[4]

In these circumstances, the Union cannot be heard to contend that the Company's actions were undertaken deliberately and unilaterally rather than in accordance with the District Court's 1975 order. Similarly, the Union cannot contend that it had no opportunity to be heard on its objections to the conciliation agreement, for the facts show that the 1975 District Court order was issued only after vigorous litigation between the EEOC and the Union regarding the legality of the contractual seniority provisions and the conciliation agreement (Petition for Certiorari, p. 3). Once these undisputed facts are

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[3] Contrary to the Union's statement that layoff grievances prompted the District Court action (Opposition Brief, pp. 4-5), the grievances that initially prompted the earlier litigation involved application of the conciliation agreement in a non-layoff context. The first layoffs under the conciliation agreement procedure occurred after the initial complaint was filed, and the Company thereafter amended its complaint to include issues regarding layoffs.

[4] The Sabella grievance involved layoffs which occurred on March 8, 1976 and October 29, 1976, and the Barrett grievances involved, in part, layoffs occurring on November 1, 1976. (Appendix to the Petition For A Writ Of Certiorari in this case, pp. 42a-43a, 47a).

added to the Union's Opposition Brief, it is clear that the Union's third argument (Opposition Brief, pp. 18-22) must fall and that the conflict between the decision *sub judice* and the decisions in *Dennison* and *Detroit Edison*[5] supports the grant of the writ of certiorari sought by the Company.[6]

2. The Union argues that the Fifth Circuit in this case appropriately decided the underlying arbitrable is-

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[5] In attempting to distinguish the cases cited at pages 23-25 of the Petition for Certiorari (*Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981) and *Local 223, Utility Workers Union of America v. The Detroit Edison Co.*, Case No. 81-70694 (E.D. Mich., So. Div. 1981)), the Union stated (Opposition Brief, pp. 20-21):

> In contrast to the current case, the *Dennison* case involved an actual court suit and the issuance of a consent decree providing, in part, for an affirmative hiring and promotion plan of limited duration on behalf of all identifiable past applicants . . . . In contrast to the instant case, as noted by the Ninth Circuit, the Union in *Dennison* had sufficient opportunity to intervene in the original proceedings but chose not to.
>
> . . . [T]he District Court . . . [in *Detroit Edison*] found that the instant case and the *Dennison* case were distinguishable because the employer in *Dennison* acted to the detriment of employees only after institution of a court order whereas the employer in the instant case voluntarily breached its contract with its employees to their detriment on the basis of a conciliation agreement alone. . . . [T]he . . . [*Detroit Edison*] court made a clear distinction between affirmative action plans adopted pursuant to court orders and those adopted pursuant to conciliation agreements.

[6] In addition, as we explained in our Petition for Certiorari (p. 22), the Congressional policy favoring voluntary conciliation of equal employment claims supports a reversal of the Fifth Circuit's decision in this case, and the General Counsel of the Equal Employment Opportunity Commission apparently agrees. Thus, the General Counsel recently announced that he planned to recommend that the Commission's voluntary compliance unit be reinstituted and that the EEOC file an *amicus curiae* brief on behalf of W. R. Grace in the instant case. (See BNA, Daily Labor Report No. 37, p. A-14 (February 24, 1982).)

sue when it announced that it (the Fifth Circuit) had decided in its 1978 ruling that the Company's layoffs pursuant to the EEOC conciliation agreement and the District Court's order had breached the collective bargaining agreement. Thus, the Union contends that when the Fifth Circuit determined in 1978 that the seniority provisions of the collective bargaining agreement were valid as a matter of law, it necessarily decided that any layoffs conducted in accordance with the conflicting provisions of the conciliation agreement (and, presumably, in accordance with the intervening court decree) violated the labor agreement. Accordingly, any arbitrator was thereafter foreclosed from finding anything other than a breach of the collective bargaining agreement by W. R. Grace (Opposition Brief, pp. 13-14). That contention, as pointed out in our Petition For Certiorari (p. 8, footnote 9), is without merit.

The Fifth Circuit, in 1978, ordered the Company to arbitrate the validity of its layoffs. It is true that the Fifth Circuit held in that decision that the seniority provisions of the collective bargaining agreement were valid. But, contrary to the Union's contention here, that decision did not necessarily mean that an arbitrator would have to find that any layoffs conducted pursuant to the conciliation agreement violated the labor agreement. Thus, the seniority provisions of the collective bargaining agreement were the only provisions of the labor agreement reviewed by the Fifth Circuit in 1978, but they were not the only provisions of that agreement. Indeed, if another provision of the labor agreement had stated, "No actions taken by the Company pursuant to a then-effective EEOC conciliation agreement or an outstanding Court order shall in any way violate the terms of this agreement even if those actions are directly contrary to the explicit terms of this agreement," then clearly the collective bargaining agreement would not have been breached by W. R. Grace's layoffs made pursuant to the conciliation agreement and court order. And

although the words of the "illegality clause" (Petition For Certiorari, p. 7, footnote 8) are not as clear as those set forth in the hypothetical provision quoted above, they do clearly support Arbitrator Sabella's determination that the Company did not breach its labor agreement when it laid off employees pursuant to the terms of the EEOC conciliation agreement and 1975 court order. (See Petition For Certiorari, pp. 12-14 and footnotes 15-16). Indeed, the Union's contention that the illegality clause applies only "the law . . . [that] the highest tribunal which considers an issue decides the law to be" (Opposition Brief, p. 16) is nothing more than an attempt by the Union to substitute its interpretation of the illegality clause for that inherent in the Sabella award.

3. The Union contends that the real issue in this case is "which of the two conflicting arbitration awards draws its essence from the contract, and thus, should be enforced" (Opposition Brief, p. 15). It is respectfully submitted that that is not the issue at all. Rather, the issue has been and remains simply whether the Sabella award was court-enforceable. Thus, the parties agree that their collective bargaining agreement requires that if the Sabella award (the first arbitration decision) "draws its essence from the contract" and is thus enforceable, the Barrett award (the second decision) must be vacated. (See Petition For Certiorari, pp. 5-6, footnotes 5-7 and accompanying text.)

But whether or not the Sabella award "draws its essence from the contract" and is thus court-enforceable is not, as the Union suggests, a factual determination which the Fifth Circuit has made in this case and to which this Court must defer (Opposition Brief, pp. 13, 17). Rather, it is a conclusion of law to be drawn from the undisputed facts in this case.[7] And, as we have shown

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[7] It is clear that the question of whether an arbitrator's award "draws its essence" from the labor agreement and is thus court enforceable requires a legal conclusion which can be resolved by

in our Petition For Certiorari (pp. 12-17), the Fifth Circuit's decision on this issue was not only wrong as a matter of law, it conflicts with the decisions of this Court and of eight other circuit courts.

CONCLUSION

For the reasons stated herein and in our original Petition, the Petition For A Writ Of Certiorari should be granted in this case.

Respectfully submitted,

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this Court on review. See *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), where this Court reversed a Fourth Circuit decision based on this Court's conclusion that the award did "draw its essence from the collective bargaining agreement." 363 U.S. at 597.

* A Partnership of Professional Associations and Professional Corporations.

Petitioner's Brief

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No. 81-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. R. GRACE AND COMPANY,
Petitioner,
v.
LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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QUESTIONS PRESENTED FOR REVIEW

1. In a suit to compel arbitration under a labor contract, may a federal court decide the merits of the dispute and thereby withdraw from the arbitrator the authority that the parties to the labor agreement gave him to decide the dispute?

2. May a federal court rule that a labor arbitration award is invalid because the award does not specifically refer to contract provisions which support the award?

3. May an employer be held liable for backpay to laid off employees when the employer selected those employees for layoff pursuant to the mandate of an EEOC conciliation agreement and a federal district court order?

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IN THE

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OCTOBER TERM, 1982

No. 81-1314

W. R. GRACE AND COMPANY,
Petitioner,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

W. R. Grace and Company ("Grace" or "the Company")[1] respectfully prays that the Supreme Court of the United States review and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (J.A. 70)[2] is reported at 652 F.2d 1248. The bench decision of the United States District Court for the Northern District

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[1] The listing of identifiable legal entities related to W. R. Grace and Company (see Supreme Court Rule 28.1) is set forth in Grace's Application for Extension of Time in Which to File Petition for Certiorari, which was filed with the Court on December 14, 1981.

[2] References to "J.A. ——" are to the parties' Joint Appendix.

of Mississippi (J.A. 58) which was reversed by the Fifth Circuit is not officially reported, but it is unofficially reported at 23 FEP Cases 852.

JURISDICTION

The judgment of the court of appeals (J.A. 91) was entered on August 10, 1981, and Grace's Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the court on September 28, 1981 (J.A. 93). With leave of this Court granted on December 14, 1981, Grace's Petition for a Writ of Certiorari was filed on January 14, 1982. Certiorari was granted on June 28, 1982, and on July 30, Grace was granted an extension to and including September 3, 1982 in which to file this brief on the merits. On August 18, 1982, the period was further extended to and including September 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The purpose and Congressional intent underlying Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), are involved in this case, but no specific statutory provisions are controlling.

STATEMENT OF THE CASE

I. Nature of the Case

This case seeks review of the Fifth Circuit's reversal of a district court judgment vacating a labor arbitration award rendered by Arbitrator Gerald A. Barrett. The Barrett award (J.A. 48) sustained grievances seeking backpay and other benefits for male employees, members of Local 759,[3] who had been laid off pursuant to the provisions of a conciliation agreement between the Company and the Equal Employment Opportunity Commission

[3] Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, herein referred to as "Local 759" or "the Union."

("EEOC") which, in a 1975 case, a federal district court had ordered both the Union and the Company to follow (J.A. 43). Arbitrator Barrett held that the Company was liable for acting in accordance with the district court's earlier order rather than in accordance with the seniority provisions of its union contract which conflicted with the court order. In so doing, Arbitrator Barrett refused to be bound by an earlier contrary arbitration award on the same issue (J.A. 45) even though the parties agree that the prior award was binding if the first arbitrator acted within his jurisdiction and authority (see n. 7, *infra*).

II. Statement of Facts

The instant dispute had its genesis in late 1973 when the EEOC issued a "Determination" (J.A. 2) finding that various employment practices at Grace's Southbridge Plastics plant in Corinth, Mississippi, violated Title VII of the Civil Rights Act of 1964. The EEOC found that the Company had engaged in past sex discrimination in hiring and job classification and that the seniority provisions of its collective bargaining agreement with Local 759 perpetuated the effects of this prior discrimination (J.A. 7-8). Accordingly, and consistent with the overwhelming weight of then-prevailing judicial authority, the EEOC determined that the seniority system itself was unlawful (*id.*).

Based on these findings, the EEOC required the Company to enter into a conciliation agreement or face court action. By early December 1974, the Company had negotiated a conciliation agreement (J.A. 10) which required relatively limited modification of the contractual seniority provisions in order to remedy the alleged unlawful perpetuation of prior discrimination. The agreement did not affect promotions based on seniority, but, instead, granted women in the affected class only limited shift protection and limited layoff protection (J.A. 15-16)—the latter being relevant to this case. The limited

layoff protection of the conciliation agreement did not give any females blanket super-seniority. Rather, the agreement provided that, if layoffs became necessary, contractual layoff provisions would apply unless the application of those provisions would result in females being laid off in greater proportions than they represented in the bargaining unit. In the latter event, the application of the contractual seniority provisions would be modified so that the percentage of females laid off would not exceed the percentage of females employed in the bargaining unit (J.A. 16). Finally, these modifications of the contractual seniority provisions were not to apply in perpetuity, but only until March 1977 when the EEOC would reevaluate the situation to determine whether the conciliation agreement procedures should be extended to effectuate the goals of Title VII (*id.*).

The Union objected to any modification of the contractual seniority provisions and sought arbitration of certain seniority grievances which are not relevant to the present case (R.5; see n. 4, *infra*). As a consequence, the Company was confronted with two conflicting claims. On the one hand, Local 759 was insisting that the contractual seniority provisions be retained, and it was demanding arbitration for the alleged violation of those provisions. The EEOC, on the other hand, had determined that those same seniority provisions violated Title VII.

Because of the EEOC's findings, the Company signed the conciliation agreement on December 11, 1974 (J.A. 60). To resolve the dilemma caused by the conflicting claims, however, the Company turned to the forum that could bind all the parties and definitively determine the Company's obligations under the collective bargaining agreement *vis-à-vis* Title VII and the conciliation agreement—the federal courts. The Company filed suit against Local 759 and the EEOC seeking a judicial determination as to which of these conflicting demands it should

follow.[4] In that proceeding, the EEOC filed counterclaims and crossclaims against the Company and Local 759, respectively, seeking a determination that the contractual seniority provisions violated Title VII or, in the alternative, a determination that the provisions of the conciliation agreement in issue should be enforced. The Union filed a counterclaim against the Company seeking arbitration of the seniority grievances.

During this time period (following commencement of the suit but before any court order), the Company was required to reduce its workforce, and did so on December 19, 1974 and on January 28 and 31, 1975 by laying off workers in accordance with the conciliation agreement (J.A. 51). The Union demanded arbitration of that layoff, and the Company amended its complaint before the federal district court to include a request that the court deny the Union's arbitration demand concerning this layoff. The Union, of course, continued to seek an order that the Company arbitrate the grievances.

After initiating suit, the Company assumed a passive role in the litigation and the case was decided on the basis of the Union's and the EEOC's cross-motions for summary judgment regarding the legality of the contractual seniority provisions (403 F. Supp. at 1187). In November 1975, the district court rendered a decision holding

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[4] *Southbridge Plastics Div., W. R. Grace and Company v. Local 759 and EEOC*, Case No. EC 74-90-S, reported at 403 F. Supp. 1183 (N.D. Miss. 1975).

Actually, the suit was filed initially prior to the execution of the conciliation agreement and only the Union was named as defendant. The original complaint sought to enjoin the Union, at least temporarily, from arbitrating certain shift preference and job assignment grievances based on the contractual seniority provisions or to have the court determine whether the contractual seniority provisions unlawfully discriminated against women and to enter appropriate relief. After the conciliation agreement was signed, the Company amended the complaint to add the EEOC as a party defendant. See 403 F. Supp. at 1185 n. 1 and 1186.

that the contractual seniority provisions were unlawful and that the limited modification of those provisions reflected in the conciliation agreement was necessary to effectuate the goals of Title VII (403 F. Supp. at 1188). Accordingly, it issued an order (J.A. 43) providing that the terms of the conciliation agreement were binding on all parties to the action and enjoining both the Union and the Company to abide by the terms of the conciliation agreement where those terms conflicted with the contractual seniority provisions.

Local 759 appealed the district court's decision to the Fifth Circuit, but it did not seek a stay of the order requiring the Company and the Union to abide by the layoff provisions of the conciliation agreement (J.A. 62). Accordingly, during the pendency of the appeal, on March 8, October 29 and November 1, 1976, employee layoffs were made in accordance with the provisions of the conciliation agreement as ordered by the district court (J.A. 46, 51).

In early 1978, following this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977),[5] the Fifth Circuit reversed the district court and ruled that the contractual seniority provisions were lawful. *Southbridge Plastics Division v. Local 759 and EEOC*, 565 F.2d 913 (5th Cir. 1978). Consequently, it granted Local 759's counterclaim seeking arbitration by stating (565 F.2d at 917): ". . . we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions. . . ."

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[5] In *Teamsters*, the Court held that a *bona fide* seniority system negotiated and maintained without a discriminatory purpose does not violate Title VII even though it perpetuates the effects of prior discrimination. In the words of Justice Marshall, in dissent, the majority "overturn[ed] the unanimous conclusion of the Courts of Appeals and the EEOC concerning the scope of Title VII" (431 U.S. at 380).

When the Fifth Circuit ruled in 1978 that the contractual seniority provisions were lawful, the Company immediately reinstated all senior male employees who would have retained their positions under the contractual seniority provisions but who, as mandated by the district court, had been and remained laid off pursuant to the provisions of the conciliation agreement (J.A. 47, 50). The Union, on the other hand, sought arbitration to determine whether the Company had violated the labor contract and thus owed backpay to the employees adversely affected by the Company's earlier application of the conciliation agreement layoff procedures.[6] That issue was presented to Arbitrator Anthony J. Sabella in August 1978. Arbitrator Sabella denied the underlying grievance, stating (J.A. 47):

> Unquestionably in the period of the violation the Employer was acting in concurrence with the District Court's order, as it was required to do. There is no evidence that the Employer was not acting in good faith in accordance with a legal court order. The Employer could not anticipate nor was it required to anticipate the Circuit's reversal. It would be inequitable and manifestly unfair to penalize the Employer under these circumstances.

Despite the fact that the Sabella arbitration had resolved the issue of the Company's liability for following the conciliation agreement and the district court order and that the award was final and binding on the Union so as

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[6] When the Fifth Circuit ordered arbitration there was an issue as to whether the senior laid-off males should remain on layoff or be returned to work. However, because the Company immediately recalled all the senior males and laid off the junior females to make room for them, that issue no longer existed when the parties first arbitrated the dispute (J.A. 47, 50). The only issues were whether the labor contract had been violated and, if so, whether backpay was a generally appropriate remedy for the senior males who had been laid off.

to prohibit it from re-arbitrating the same issue,[7] Local 759 insisted that other "conciliation grievances" presented different issues and should proceed to arbitration before Gerald A. Barrett.[8] Although Mr. Barrett recognized that the grievances before him were the same as those decided by Arbitrator Sabella (J.A. 51), he refused to follow the Sabella award because, according to Mr. Barrett, Arbitrator Sabella had exceeded his jurisdiction and authority by basing his award upon equity (J.A. 54-56). And, contrary to Arbitrator Sabella, Mr. Barrett found that the Company was liable for having laid off employees in accordance with the conciliation agreement and the district court order rather than in accordance with the contractual seniority provisions (J.A. 56-57).

The Company then commenced the present suit in the United States District Court for the Northern District of Mississippi[9] to set aside Arbitrator Barrett's award on two basic grounds. First, the Barrett award could not

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[7] Both the Union and the Company agree that, under their collective bargaining contract, the decision of an arbitrator adjudicated within his jurisdiction and authority bars re-arbitration of the same issue before another arbitrator. During oral argument before the Fifth Circuit, Union counsel specifically conceded that the Union agreed that the Barrett award had to be vacated if the appellate court determined that the Sabella award was valid. Thus, this case does not present the question of whether, as a matter of law, one arbitration award precludes re-arbitration of the same issue before a different arbitrator.

[8] Before both Arbitrator Barrett and the district court below, the Union argued that the Sabella award did not foreclose a contrary decision by Arbitrator Barrett because the Sabella grievance involved employees bumping into lower paying jobs during a layoff whereas the Barrett grievances involved layoffs from the plant. Both Arbitrator Barrett (J.A. 51) and the district court (J.A. 67-68) rejected this contention, and the Union abandoned that argument before the Fifth Circuit.

[9] The district court had jurisdiction under Section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 185), and under Section 10 of the United States Arbitration Act (9 U.S.C. § 10).

be enforced because the Sabella award was clearly valid under all existing precedent and, under the parties' collective bargaining contract, a valid Sabella award would mean the Barrett award must be vacated.[10] Second, even in the absence of the Sabella award, the Barrett award could not be enforced because to do so would penalize the Company for complying with the district court order and doing exactly what the EEOC, an agency of the federal government, had required. The district court agreed, holding that the Sabella award was valid and, further, that it would be contrary to law and public policy to penalize the Company for abiding by the district court order (J.A. 64-68). Accordingly, the district court vacated the Barrett arbitration award.

The Fifth Circuit reversed. Given the parties' agreement that if the Sabella award was valid the Barrett award must be vacated, the appellate court recognized that the validity of the Sabella award was a controlling issue. The court rejected the Company's contention that the Union had waived its right to attack the Sabella award by not bringing a timely suit to vacate (J.A. 86-87), and it concluded that the award was invalid for two reasons. First, the court found that its 1978 ruling on the Union's motion to compel arbitration had conclusively determined that the Company had breached the collective bargaining contract[11] and that Arbitrator Sabella had no authority to decide otherwise. Thus, the Fifth Circuit stated (J.A. 85-86) that in the 1978 decision the court:

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[10] As a subsidiary of this argument, the Company also contended that the Union's failure to have the Sabella award judicially vacated within the statutory time limits for actions to vacate foreclosed its present attack on the validity of that award.

[11] The Fifth Circuit, of course, had not said that in 1978. Rather, it ordered arbitration of "the Company's breach . . . of the *seniority provisions*," not of the labor contract (565 F.2d at 917; emphasis added).

> withdrew from the authority of the arbitrator any right to decide that the employer had not breached the contract and, therefore, was not liable to the employees for having followed the conciliation agreement. It was determined by the specific holding that the employer had breached the contract. Our interpretation of the contract is res judicata and is binding. Arbitrator Sabella's decision is directly contrary to our holding. He specifically found no breach. This Court's binding decision left as the only issues before the arbitrator, which employees had been victims of the breach and damages for the breach. Our holding meant the arbitrator was no longer free to decide whether the employer should be liable for a breach or not.

Second, despite the fact that the Sabella award was supported by certain specific terms of the collective bargaining agreement,[12] the appellate court held that the award was invalid because the arbitrator had "departed from the terms of the collective bargaining agreement" (J.A. 80). Thus, the court stated that "Arbitrator Sabella did not even refer to the collective bargaining agreement in his award but referred only to the fact that 'it would be inequitable and manifestly unfair' to hold against the employer" (*id.*). Further, the court found that the "illegality clause" of the contract did "not necessarily make the Sabella award valid because the Sabella award was not based upon the contract as it applies in the light of the law, but was based solely upon equitable principles and fairness" (J.A. 80-81).

With respect to the other issue that would require vacating the Barrett award—*i.e.*, whether Grace could be

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[12] The "illegality clause" of the parties' contract, Article XIV, Section 7 (J.A. 29), provides:

> In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

penalized for obeying the district court injunction—the appellate court concluded that liability could be imposed because Grace had no obligation to obey the 1975 district court order during the pendency of the earlier appeal inasmuch as the order was later reversed by the Fifth Circuit (J.A. 87-88).[13]

The conclusions of the Fifth Circuit and the grounds underlying those conclusions are at odds with the applicable decisions of this Court and other federal appellate courts. Further, they announce a rule of law that plays havoc with the arbitral process and with the enforcement of our national discrimination laws. For the reasons discussed below, we respectfully submit that this Court should reverse the decision of the Fifth Circuit and vacate the Barrett arbitration award.

SUMMARY OF ARGUMENT

In a decision that flouts settled rules of arbitration law and denigrates the principle that court orders are inviolable, the Fifth Circuit has reinstated the Barrett arbitration award that had been properly vacated by the district court. The Barrett award required the Company to pay thousands of hours of backpay despite the fact that the Company's actions resulting in that award (1) were required by a conciliation agreement demanded by the EEOC, (2) were ordered by a federal district court, and (3) were earlier upheld by Arbitrator Sabella, whose decision, if valid, precluded the contrary award of Arbitrator Barrett. Although the appellate court offered several reasons for its result, it is respectfully submitted that

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[13] Throughout both arbitration proceedings, the district court case and the court of appeals case, the Union made no distinction between the layoffs which occurred before and after the district court order. Accordingly, this case has been litigated throughout on the assumption that all layoffs occurred after the district court order, or, alternatively, are subject to the same legal analysis as if they occurred after that order.

the court was wrong on all counts and that this Court should reverse.

First, given the parties' agreement that a valid Sabella award foreclosed Arbitrator Barrett from rendering a contrary award, the appellate court correctly recognized that the invalidity of the former award was a necessary prerequisite to enforcement of the latter award. It erred, however, in concluding that the validity of the Sabella award was open to attack in this proceeding. The question of whether Arbitrator Sabella exceeded his authority was one for judicial determination, and once the statutory limitations period for seeking that determination passed, it could not be resurrected by Arbitrator Barrett's inappropriate decision on that issue. Thus, the Sabella award should have been presumed valid, and, by holding to the contrary, the Fifth Circuit has permitted the Union to manipulate the arbitral process to achieve a result which is inconsistent with the policies favoring arbitral finality and the rapid disposition of labor disputes.

Second, even assuming the Sabella award was subject to challenge, the Fifth Court erred in ruling that the award was invalid because the court itself had already decided the merits of the contract dispute in its 1978 decision ordering arbitration of the dispute. It is clear that arbitrators, not courts, have the responsibility to determine claims of labor contract violations. Indeed, this Court's decisions in the *Steelworkers Trilogy* make clear that in suits to compel arbitration the courts have no business even weighing the merits of a contract claim, much less deciding the alleged contract violation. Thus, the Fifth Circuit's holding that it had earlier decided the contract claim and had thereby withdrawn Arbitrator Sabella's authority to interpret the parties' agreement is certainly wrong as a matter of law and is probably wrong as a matter of fact (since it is unlikely that the earlier panel intended to decide the merits of the Union's grievance).

Third, the appellate court also erred in finding Sabella's award invalid because it did not refer specifically to provisions of the labor agreement that supported the award. The "illegality clause" in the parties' labor agreement was designed to relieve the Company and the Union of their contractual obligations under any term of that agreement found to violate the law—the exact circumstance that occurred in this case. Arbitrator Sabella's award was clearly supported by that provision, and it was also within his discretion to frame a "no backpay" remedy in the circumstances presented. Accordingly, because this Court's *Steelworkers Trilogy* and its progeny establish that an arbitration award will be enforced if it can in any rational way be derived from the letter or purpose of the contract, the Sabella award was valid. As a consequence, the Barrett award must be vacated.

Fourth, even if the Barrett award were not foreclosed by the Sabella award, it may not be enforced, for to do so would render the Company liable for obeying a federal district court order which prohibited the Company and the Union from applying the very provisions of their labor agreement upon which Barrett based his decision and award. In deciding to the contrary, the Fifth Circuit clearly erred in concluding that the Company had no obligation to comply with the EEOC conciliation demand or to obey the district court order because that order was later reversed on appeal. Court orders must be obeyed until, *not unless*, reversed on appeal. Thus, the Barrett award must be vacated under the well-established principle that courts should not enforce arbitration awards which compel or sanction violations of law or public policy—in this case, the violation of a binding court order.

Finally, the Barrett award must be vacated because it substantially interferes with the specific national policy strongly favoring conciliation and voluntary compliance with the non-discrimination requirements of Title VII. In this case the EEOC determined in 1973 that the layoff

seniority provisions of the parties' labor agreement violated Title VII—a determination overwhelmingly supported by then-existing judicial authority. Accordingly, rather than litigate the issue, the Company in good faith entered into a conciliation agreement demanded by the EEOC, just as Congress had encouraged employers to do when it enacted the provisions of Title VII requiring voluntary compliance efforts in advance of litigation. 42 U.S.C. § 2000e-5(b), (f)(1). Although those layoff seniority provisions were later determined to be legal because of this Court's *Teamsters* decision, earlier judicial precedent to the contrary and the policy of voluntary compliance cannot justly be ignored. Indeed, to now hold the Company liable for backpay based upon its adherence to that conciliation agreement would totally frustrate the voluntary compliance program Congress envisioned. For few employers are apt to cooperate with the EEOC's conciliation efforts if they will thereafter be subject to massive liability in the event this Court later decides that the EEOC, the lower courts, and perhaps even this Court in an earlier decision, were incorrect. And few unions will be willing to become involved in the conciliation process with an employer and the EEOC if they can frustrate the employer's conciliation efforts at no risk to themselves and seek contrary relief in an arbitral forum. To avoid these results and further Congress' goal of conciliation and voluntary compliance, the Fifth Circuit judgment must be reversed.

ARGUMENT

I. ARBITRATOR SABELLA HAD THE POWER TO DECIDE THE QUESTION OF CONTRACT VIOLATION, HIS AWARD IS VALID, AND THE BARRETT AWARD MUST THUS BE VACATED

Given the parties' agreement that a valid Sabella award would bar re-arbitration of the same issue before Mr. Barrett, the court of appeals correctly determined that the validity of the Sabella award was a controlling issue. It erred, however, in concluding that the Sabella award was invalid, and the grounds upon which the court premised its conclusion are contrary to overwhelming judicial precedent and the principles of arbitral finality announced by this Court.[14]

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[14] Indeed, the appellate court erred in even considering the Union's attack on the validity of the Sabella award. In rejecting the Company's contention that the Union had waived its right to attack the Sabella award by not bringing a timely judicial action to vacate, the appellate court held that the Union had a right to demand a second arbitration to test the validity of the prior arbitration award. In reaching that conclusion, however, the court relied upon cases wholly inapposite to the issue raised by Grace. See J.A. 86-87. For in two of those cases the courts ordered second arbitrations because the issues were clearly or potentially different from the issues considered by the first arbitrators (*Local 103, Int'l U. of Elec., Radio & Mach. Wkrs. v. RCA Corp.*, 516 F.2d 1336, 1339 (3d Cir. 1975); *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 973-974 (3d Cir. 1972)) and in the other case the court reluctantly upheld a second award that clarified an ambiguity in the first award regarding the method of calculating backpay (*San Antonio Newspaper Guild, Local 25 v. San Antonio Light Division*, 481 F.2d 821 (5th Cir. 1973)).

The instant case is clearly distinguishable from the foregoing cases, for here Arbitrator Barrett, in essence, vacated the Sabella award because Mr. Sabella allegedly exceeded his authority under the contract. But such determinations regarding the scope of arbitrators' authority are for courts, not arbitrators, to make. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 583 n. 7 (1960); *Wire Service Guild, Local 222 v. UPI*, 623 F.2d 257 (2d Cir. 1980); *Westinghouse Broadcasting Co. v. Local 804, IATSE*, 616 F.2d 97 (3d Cir. 1980); *Piggly Wiggly*

A. The Fifth Circuit's 1978 Decision Did Not And Could Not Foreclose Arbitrator Sabella From Deciding The Contract Dispute

It is uncontroverted that the parties' collective bargaining agreement provided that disputes involving alleged violations of the agreement were to be referred to

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Operators' Whse., Inc. v. Piggly Wiggly Operators' Whse. Indep. Truck Drivers, Local 1, 611 F.2d 580, 583 (5th Cir. 1980); *Mobil Oil Corp. v. Local 8-766, Oil, Chem. & At. Wkrs.*, 600 F.2d 322, 324 (1st Cir. 1979).

Indeed, the Union concedes that *de novo* court review of the validity of the Sabella award was appropriate (see n. 7, *supra*). Although we agree that the question of Arbitrator Sabella's authority, if open for review, is one that must be decided *de novo*, we disagree with the Union's apparent contention that this issue has somehow been resurrected by Arbitrator Barrett's inappropriate decision on the subject. Indeed, this assertion flies in the face of the well-established policy of arbitral finality, for it permits the Union to manipulate the arbitral process to avoid the statute of limitations for actions to vacate arbitration awards. (See *Rigby v. Roadway Express*, —— F.2d ——, 110 LRRM 3286 (5th Cir. 1982) (In Mississippi [where the instant case arose], actions to vacate arbitration awards must be commenced at the next term of court following the making and publication of the award.)) This Court itself has recognized that the federal policy favoring rapid disposition of labor disputes supports the adoption of short limitations periods for actions to vacate arbitration awards. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981). And consistent with this principle, lower courts have held that once the limitations period has passed, an arbitration award must essentially be presumed valid. For example, in *Teamsters, Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981), the court held that a party which had not moved to vacate an arbitration award within the 90 days provided by Indiana law could not later assert the invalidity of the award as a defense in an enforcement action commenced after the 90 days had expired. *Accord: Service Employees International Union, Local 36 v. Office Center Services, Inc.*, 670 F.2d 404 (3d Cir. 1982); *Carpenters 46 No. Calif. Co. Conf. Bd. v. Meddles*, 535 F. Supp. 775 (N.D. Cal. 1981); *Charles County Board of Education v. Education Ass'n*, 286 Md. 358, 408 A.2d 89 (1979); *Pennsylvania Labor Relations Board v. Pennsylvania*, 478 Pa. 58, 387 A.2d 475 (1978). The rationale of these cases, as stated by the Seventh Circuit in

and decided by an arbitrator (J.A. 18-19). Nevertheless, the Fifth Circuit has now stated in the instant case that its 1978 ruling on the Union's counterclaim seeking to compel arbitration conclusively determined the question of contract violation and hence withdrew that issue from Arbitrator Sabella.[15] In so holding, the appellate court

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Jefferson Trucking, is that the short limitations periods were intended to promote the federal policy favoring voluntary arbitration by according arbitration awards finality in a timely fashion and that "this policy would seem to condemn the conduct of the defendant who ignored an award disfavorable to it, failed to move to vacate the award, and then sought to be given its day in court when the plaintiff brought suit . . . to have the arbitration award enforced." 628 F.2d at 1027. This same policy, of course, no less condemns Local 759's instant attempt to "bootstrap" its challenge to the Sabella award by raising that challenge as a defense to the Company's action to vacate a subsequent contrary arbitration award.

In sum, once the statutory period for seeking to vacate the Sabella award passed, its validity was no longer open to question by the Union, by Barrett, or by the Fifth Circuit, and the Fifth Circuit should have presumed its validity for purposes of this litigation. Accordingly, under the parties' interpretation of the finality clause of their contract, the Barrett award must be vacated.

[15] The parties affected by the 1978 decision had no idea that the Fifth Circuit's cryptic statement, ". . . we grant the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach . . . of the seniority provisions . . ." (565 F.2d at 917), was intended to withdraw from arbitration all issues except damages. Indeed, although the Fifth Circuit panel considering the instant dispute asserted this to be the holding of the panel that heard the 1978 dispute, it is quite unlikely that the earlier panel decided that issue. Although the 1978 panel spoke in terms of the Company's acknowledged "breach . . . of the seniority provisions," that does not necessarily mean that the collective bargaining agreement was breached. *See, e.g., NF&M Corp. v. United Steelworkers*, 524 F.2d 756, 759 (3d Cir. 1975) (An arbitrator's award that deviates from the plain meaning of one contract provision will be enforced if it otherwise finds support in other provisions of the contract.). Moreover, the 1978 case essentially dealt only with the legality of the contractual seniority provisions under Title VII. The court never discussed any contract provisions ex-

acted contrary to the law of this Court and the established precedent of every circuit court in the federal judicial system.

The decisions of this Court could hardly be clearer or more emphatic on the question of courts' authority to decide questions of labor contract violations in suits to compel arbitration or to review arbitration awards. Thus, this Court has stated that the question whether a labor agreement has been violated "is a question for the arbiter, not for the courts" (*United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 585), and that in actions to compel arbitration

> [t]he function of the court is very limited. . . . It is *confined to* ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract intepretation for the arbitrator. . . .
>
> The Courts, therefore, have no business weighing the merits of the grievance. . . .

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-568 (1960) [emphasis added].[16] Every other circuit

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cept the seniority clause and it appropriately (see discussion *infra*) did not deal with the merits of any breach of contract claims or defenses. Finally, the Union did not argue in either subsequent arbitration that the arbitrator was restricted to deciding who was to receive how much backpay. Both arbitrators were presented with and dealt only with the question of whether there had been a contract breach, not with the amount of backpay. Thus, at the very least, following the Fifth Circuit's order to arbitrate, the parties understood their dispute to be whether the labor agreement had been violated, and the Fifth Circuit was bound by that understanding. See *Piggly Wiggly Operators' Whse., Inc. v. Piggly Wiggly Operators' Whse. Indep. Truck Drivers, Local 1, supra*, 611 F.2d at 583.

[16] Indeed, this Court has held that courts may not even render a preliminary nonbinding opinion on the merits of a labor grievance. In *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), this Court held that federal courts may not enjoin a union's

court in the country has acknowledged and followed this Court's mandate.[17]

The Fifth Circuit's infidelity to this Court's decisions is manifest in its opinion below. Thus, the appellate court speaks of its earlier "interpretation of the contract," of that interpretation being "res judicata and

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sympathy strike pending arbitration of whether that strike violates the union's no-strike pledge in its labor contract. The Court reasoned that to allow courts to decide preliminarily whether the no-strike clause had been violated would result in courts determining the issues the parties had agreed should be decided by an arbitrator. 428 U.S. at 411-412.

[17] *Blake Construction Co. v. Laborers' Int'l Union*, 511 F.2d 324, 327 (D.C. Cir. 1975); *Warren Brothers Co. v. Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973); *Bressette v. International Talc Co.*, 527 F.2d 211, 214 (2d Cir. 1975); *H. Prang Trucking Co. v. Local 469, Int'l Bhd. of Teamsters*, 613 F.2d 1235, 1237 (3d Cir. 1980); *International Bhd. of Teamsters, Local 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 1342 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); *Smith v. Union Carbide Corp.*, 350 F.2d 258, 261 (6th Cir. 1965); *Local 82, United Packinghouse Wkrs. v. United States Cold Storage Corp.*, 430 F.2d 70, 72 (7th Cir. 1970); *Western Iowa Pork Co. v. National Bhd. of Packinghouse & Dairy Workers, Local 52*, 366 F.2d 275, 278 (8th Cir. 1966); *Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F.2d 496, 499-500 (9th Cir. 1976); *Oil, Chemical & Atomic Workers, Local 2-124 v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976).

Prior to its decision in this case, the Fifth Circuit itself had followed this unbroken line of authority. Thus, for example, that court stated in *Gulf Oil Corp. v. International Union of Operating Engineers*, 279 F.2d 533, 535 (5th Cir.), *cert. denied*, 364 U.S. 871 (1960):

> The merits of a suit to compel arbitration, of course, do not include the determination (1) of the underlying facts and (2) what the ultimate outcome of the controversy will be. These, if the matter is arbitrable, are for the determination of the arbitrator.

See also, *e.g.*, *Piggly Wiggly Operators' Whse., Inc. v. Piggly Wiggly Operators' Whse. Indep. Truck Drivers, Local 1*, *supra*.

. . . binding" on Arbitrator Sabella, and of its "withdr[awing] from the arbitrator the authority" to determine whether the contract had been breached (J.A. 85-86).[18]

In sum, the Fifth Circuit's decision in this regard represents a radical departure from this Court's established precedent and a flagrant violation of perhaps the most fundamental and unwavering principle of labor arbitration law. Arbitrator Sabella, not the Fifth Circuit, had the authority to decide whether Grace's actions violated its labor contract, and his award cannot be vacated on the basis of the Fifth Circuit's 1978 ruling on the collateral issue of the legality of the contract's seniority provisions.

B. The Sabella Award Is Supported By The Provisions Of The Collective Bargaining Agreement And It Is Thus A Valid Award Which Renders The Barrett Award Unenforceable

The "illegality clause" of the collective bargaining contract before Arbitrator Sabella for interpretation and application stated that any provision of the contract found to be in conflict with law would be superseded by such law. (See n. 12, *supra*.) In determining that the Company was not liable for failing to apply the contractual seniority provisions that the EEOC and district court had found to violate Title VII, Arbitrator Sabella

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[18] The Court supported its departure from established principles of labor arbitration law by analogizing its action in this case to the situation in which a circuit decides an issue earlier presented to a district court and remands the remainder of the case to that district court for further proceedings. (See J.A. 84-85.) Thus, the court found the instant case to be controlled by *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), in which the court, on appeal, had decided an issue and thereby withdrew it from consideration by a district court on remand. The analogy is, of course, inapplicable. Certainly a circuit court can decide issues for the district courts, but that does not mean it can decide them for arbitrators. See nn. 16 and 17, *supra*, and accompanying text.

found that the Company "was acting in concurrence with the District Court's order, as it was required to do," that the Company "could not anticipate nor was it required to anticipate the Circuit's reversal," and that "[i]t would be inequitable and manifestly unfair to penalize the [Company] under these circumstances" (J.A. 47).

Arbitrator Sabella's award is clearly supported by the contract's illegality clause.[19] That clause, of course, can

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[19] Numerous arbitrators have applied similar contract clauses, or the general theory of impossibility of performance, to excuse nonperformance of contract obligations in situations factually similar to the instant case. See, *e.g.*, *IMC Chemical Group*, 73 LA 215 (Owen 1979) (Where the Department of Energy directed the employer to give females constructive seniority in order to be in compliance with the Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") requirements under Executive Order 11246, the resulting violation of the contractual seniority provisions was excused.); *International Paper Co.*, 69 LA 857 (Taylor 1977) (The company was justified in assigning a junior black employee to an apprenticeship program where the action was taken pursuant to the employer's affirmative action program required by OFCCP directives.); *United Telephone of the Carolinas Inc.*, 66 LA 1 (Foster 1976) (The illegality provision in the parties' contract should not be read to require an actual court decision before the company took corrective action, and the company thus did not violate the contract when it revised its maternity leave policy to comply with EEOC guidelines even though the new policy conflicted with the contractual seniority provision.); *Todd Shipyards Corp.*, 65 LA 1019 (Koven 1975) (The employer did not violate its contract by hiring a Viet Nam veteran who was not referred by the union under its contractual referral system where the veteran was hired pursuant to the employer's affirmative action program under Executive Orders and the contract contained an illegality clause indicating the parties' intent that provisions not in harmony with law would fall.); *Copolymer Rubber & Chemical Corp.*, 64 LA 310 (Dunn 1975) (The company was excused from following its contractual departmental seniority provisions where the OFCCP required that employees be given plant seniority as part of the employer's affirmative action compliance program and where the contract provided that the agreement would be subject to all federal and state laws and the company had acted in good faith upon the government's ruling.); *Keene Corp.*, 63 LA 169 (Williams 1974) (The employer was not required to make con-

be read to excuse non-performance of a contractual obligation during the pendency of an outstanding determination that performance by either party would be illegal, even though it is later determined that performance would not, in fact, be in conflict with law. Under this interpretation, the EEOC's and district court's determinations that the contractual seniority provisions were illegal, together with the injunction requiring both parties to follow the conciliation agreement, would have relieved Grace, as well as the Union, of any obligation to apply those provisions until such time as a higher authority determined that their application would not violate the law. Although Arbitrator Sabella did not specifically elucidate this application of the illegality clause, his finding that Grace was acting in accordance with the district court order and was not required to anticipate the circuit's reversal is consistent with this rationale and certainly is supported by the clause.[20]

Alternatively, Arbitrator Sabella's award may also be interpreted as a finding that the Company breached the

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tractual cost-of-living payments when such payments would have exposed it to criminal and civil penalties under Phase II wage and price controls or when such payments were prohibited under Phase III without punitive sanctions, but it would be required to resume payment when controls were lifted.); *Bethlehem Steel Corp.*, 63 LA 63 (Strongin 1974) (A decision of the Secretary of Labor directing the company to use plant rather than unit seniority relieved the company of its obligation to follow the contractual unit seniority provisions.); *ASG Industries, Inc.*, 62 LA 849 (Foster 1974) (The employer was justified in discontinuing its use of a contractually mandated aptitude test where the OFCCP had instructed the company to discontinue unvalidated testing and the parties' contract contained a clause invalidating provisions in conflict with law.); *Macy's New York*, 57 LA 1115 (Stark 1971) (The company was justified in withholding contractual wage increases where wage and price controls prohibited such increases and the parties' contract contained a clause invalidating provisions in conflict with law.).

[20] Indeed, Arbitrator Sabella's specific finding that the Company "was [not] required to anticipate the Circuit's reversal" only leads one to inquire, "required by what?" The only rational answer is the illegality clause of the parties' contract.

agreement but that, in circumstances where the Company was adhering to an EEOC determination and a district court order, backpay would not be awarded. As the labor agreement did not mandate a backpay award, Arbitrator Sabella would have been simply exercising his judgment and discretion in framing a fair and equitable remedy to which a court must defer. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."). See also, for example, *Carey v. General Electric*, 315 F.2d 499, 512 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964), where the court ordered arbitration regarding a clause the employer claimed to be illegal because it found that even if the arbitrator were to uphold the union's construction of the clause, he might "decline to fashion an award based upon it for fear that he would encourage a practice banned by the labor act."

Despite the fact that the Sabella award is clearly supported by the contract, however, the Fifth Circuit found that Arbitrator Sabella had exceeded his authority because his "award was not based upon the contract as it applies in light of the law, but was based solely upon equitable principles and fairness" (J.A. 81). The appellate court found "[t]his conclusion . . . inescapable since arbitrator Sabella did not even refer to the collective bargaining agreement in his award. . ." (J.A. 80).[21]

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[21] To the extent that the Fifth Circuit's discussion of "The Law of the Contract" (J.A. 80-84) can be read to imply that the illegality clause could not relieve the Company of its obligation to follow the contractual seniority provisions, the court is wrong on at least two counts.

First, even if the court were correct in stating that judicial decisions in general (and its 1978 decision in particular) merely declare the law as it has always existed, the question in the instant case was not what the "true" law of the land was during

Thus, the Fifth Circuit concluded that a labor arbitration award, even though supported by the terms of the contract, is invalid when the award does not refer to a specific contractual provision which supports the award. In so doing, the appellate court clearly failed to heed

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the term of the parties' labor contract. Rather, the issue was: what was the contractual agreement of the parties? Clearly, Arbitrator Sabella had the authority to determine that the illegality clause had relieved Grace of any obligation to apply the seniority provisions during the pendency of administrative and judicial determinations of illegality, and that this resulted not because the provisions were in fact illegal under the "true" law but because the parties had intended the illegality clause to operate during the pendency of even erroneous determinations of illegality. Thus, the Fifth Circuit's suggestion that the "true" law must control under the illegality clause is simply a substitution of its interpretation of the contract for that of Arbitrator Sabella, a result clearly not permitted under this Court's decisions. (See nn. 16 and 17, *supra*, and accompanying text.)

Second, the Fifth Circuit simply dealt with the wrong analogies when it discussed the fact that a party is liable for damages when it rescinds a contract, acts in violation of the antitrust laws, or violates the secondary boycott prohibitions of the National Labor Relations Act even though the party has a good faith but mistaken belief that it is operating in accordance with the law of the land (J.A. 81-82). For in this case, the Company was not acting unilaterally based on its own interpretation of what the law required; rather it was acting pursuant to a determination of the EEOC and an injunction of the district court telling the Company precisely how it had to act. Thus, a relevant analogy in the case of a secondary boycotting union is posed by the following question: When a union has been ordered to cease and desist its secondary boycott activity, would a court hold that union liable for damages in a suit by employees who claim that the union's failure to vigorously pursue its secondary pressure after issuance of the order denied them (the employees) full, fair and adequate representation? Or would a court find that federal employees have acted improperly by not releasing data pursuant to a Freedom of Information Act request when those employees had been enjoined by another court from releasing the data? In both examples, we submit, the answer is, "Of course not," even if those cease and desist and court orders were later reversed on appeal. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980).

this Court's holding in *United Steelworkers v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 598, that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." Interpreting that mandate, federal courts have been virtually unanimous in holding that an arbitration award draws its essence from the contract and must be enforced if the award can be rationally derived from the terms of the contract, even though the arbitrator's reasoning may be wrong or ambiguous, even though he may give no reason at all, and even though the court itself has to look through the agreement and develop its own rationale for sustaining the arbitrator. Thus, for example, in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969), the Third Circuit explained this Court's ruling as follows:

> [A] labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by the principles of contract construction and the law of the shop, may a reviewing court disturb the award.

Applying that standard, the Third Circuit enforced an arbitration award which on its face seemed to be at odds with the provisions of the labor contract. Although the arbitrator had not explained his reasoning, the court set forth two lines of reasoning which the arbitrator "could have" employed to reach his conclusion and, based upon these court-supplied reasons, enforced the award (405 F.2d at 1132). See also, for example, *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 756, n. 3 (3d Cir. 1982) (The court is limited to the inquiry whether the arbitrator could possibly have made a contract interpretation that supports his award, and where the arbitrator

could have found that one clause of the contract overrode another, the award will be enforced even though the arbitrator did not explicitly set forth this analysis of the relationship between the two clauses.); *Kewanee Machinery Division v. Local 21, Int'l Bhd. of Teamsters*, 593 F.2d 314, 318 n. 6 (8th Cir. 1979) (Because a mere ambiguity in an arbitration opinion is not sufficient to deny enforcement, the district court erred in determining that the arbitrator had based his award on his own subjective feelings because he had described the controlling contractual provisions as "patently unfair" and "repugnant to fundamental notions of fair play."); *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 703-704 (2d Cir. 1978) (An arbitration award must be upheld if there is a "barely colorable justification" for the decision.); *IBEW v. Professional Hole Drilling, Inc.*, 574 F.2d 497, 503 (10th Cir. 1978) (An arbitration award will be enforced if the contract language is susceptible to the arbitrator's interpretation.); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers, Local 7-1*, 548 F.2d 1288, 1294 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977) (An arbitration award must be upheld if a rational basis for the award can be derived from the language of the contract, and "the fact that an arbitrator's opinion is susceptible of varying interpretations is of no moment in the determination of the validity of the accompanying award."); *NF&M Corp. v. United Steelworkers, supra*, 524 F.2d at 760 (Although the arbitrator did not elucidate the grounds for his determination, there were several rationales that the arbitrator might have used to reach that conclusion, and his award thus must be enforced.); *Amalgamated Meat Cutters, Local 195 v. Cross Bros. Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975) (Where there were ample grounds on which the arbitrator could have based his decision, his failure to articulate those grounds does not warrant vacating the award.); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1216 (2d Cir. 1972) (If a ground for the

arbitrator's decision can be inferred from the facts of the case, then the award should be enforced.); *United Steelworkers v. Amax Aluminum Mill Products, Inc.*, 451 F.2d 740, 742-743 (9th Cir. 1971) (If an award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.); *Kroger Co. v. International Bhd. of Teamsters, Local 661*, 380 F.2d 728, 730-732 (6th Cir. 1967) (An award will be enforced where it finds support within the four corners of the contract.); *Keen Mountain Constr. Co. v. Chambers*, 481 F. Supp. 532, 537 (W.D. Va. 1979) (Although the arbitrator did not explain his award requiring the employer to allow the grievant to execute a layoff slip after expiration of the contractual time limits for executing such slips, the award would be enforced because the arbitrator "could have reasoned" that the layoff slip clause had to be interpreted in light of the contractual seniority provisions and "probably found" that the failure to execute the layoff slip was neither party's fault.); *Victor Electric Wire and Cable Corp. v. IBEW, Local 2014*, 411 F. Supp. 338, 341-343 (D.R.I.), *aff'd without published opinion*, 546 F.2d 413 (1st Cir. 1976) (An arbitrator's award based on his "implicit" finding that one contract provision overrode another must be enforced unless it is impossible to reconcile with the contract.); *Crigger v. Allied Chemical Corp.*, 367 F. Supp. 1133, 1139 (S.D. W. Va. 1973), *aff'd*, 500 F.2d 1218 (4th Cir. 1974) (An award draws its essence from the contract and must be enforced if a rational basis for the award can be derived from the agreement.); *Dean Truck Line, Inc. v. Local 667, Int'l Bhd. of Teamsters*, 327 F. Supp. 1335, 1342 (N.D. Miss. 1971) (Where there is substantial evidence before the arbitrator that would have justified the award, the award will be enforced regardless of the process of reasoning employed to reach the result.); *Graham v. Acme Markets, Inc.*, 299 F. Supp. 1304, 1308-1309 (E.D. Pa. 1969) (Courts cannot conclude that an arbitrator did not consider a contract provision because it was not men-

tioned in his opinion, since an ambiguity in an opinion is not sufficient to vacate an arbitration award.).[22]

In sum, the Fifth Circuit's determination that the Sabella award was invalid is simply irreconcilable with a long line of judicial decisions emanating from this Court's decisions in *Enterprise Wheel* and the other two decisions in the *Steelworkers Trilogy* (*United Steelworkers v. American Mfg. Co.*, *supra*, and *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*). Those decisions and their progeny are based on this Court's recognition that the paramount labor policy favoring the achievement of industrial peace through arbitration "can be effectuated only if the means chosen by the parties for the settlement of their differences . . . is given full play" (*United Steelworkers v. American Mfg. Co.*, 363 U.S. at 566), and that this "full play" necessarily encompasses extremely limited judicial review of arbitration awards. The Fifth Circuit transgressed those limits in the instant case to sec-

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[22] Indeed, the Fifth Circuit has professed to follow these established legal principles, although it clearly did not do so in the instant case. See, *e.g.*, *Air Line Pilots Ass'n v. Eastern Airlines*, 632 F.2d 1321, 1323 (5th Cir. 1980) (The fact that the arbitration board's decision contained no clear expression of why the grievant would be reinstated without a full exoneration is not a fatal omission, and the district court erred in refusing enforcement because the board's decision appeared to exonerate grievant without giving him the full benefit of exoneration.); *International Union of Dist. 50, UMW v. Bowman Transp., Inc.*, 421 F.2d 934, 936 (5th Cir. 1970) (Any ambiguity is to be resolved in favor of the award because, *inter alia*, an award is to be enforced if the interpretation can in any rational way be derived from the agreement.); *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970) (An arbitration award merits enforcement if it has a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement.)

And these were cases in which the attacks on the awards were all direct and timely. As we have previously stated (n. 14, *supra*), the Union's attack on the Sabella award in the instant case was neither.

ond-guess Arbitrator Sabella's reasoning and thus to invalidate an award which is inarguably supported by the collective bargaining agreement. Accordingly, because the parties agreed that a valid Sabella award dictates that the Barrett award be vacated, Grace prays that this Court reverse the Fifth Circuit and deny enforcement of the Barrett award.

II. THE BARRETT AWARD MUST BE VACATED BECAUSE ITS ENFORCEMENT WOULD SANCTION VIOLATIONS OF LAW AND PUBLIC POLICY

In its decision below, the Fifth Circuit reversed the district court's determination that a second, independent ground existed for vacating the Barrett arbitration award—the fact that enforcement of the award would violate the established law and public policy mandating adherence to court orders, as well as the policy favoring voluntary compliance with employment discrimination laws.[28] Thus, the appellate court held Grace liable for

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[28] It is clear that arbitration awards may be vacated because they contravene the law or public policy. For example, in *Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), the court stated:

> It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States. * * *" Hurd v. Hodge, 344 U.S. 24, 34-35 . . . (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts . . . are empowered to fashion.

See also, *e.g.*, *Local P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, —— F.2d ——, 110 LRRM 2805 (7th Cir. 1982); *Communications Wkrs. of America v. Mountain States T & T Co.*, —— F.2d ——, 102 LRRM 2161 (10th Cir. 1978); *General Warehousemen and Helpers, Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1291-1293 (5th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979); *Banyard v. N.L.R.B.*, 505 F.2d 342, 347 (D.C. Cir. 1974); *Gulf States Telephone Co. v. Local 1692, IBEW*, 416 F.2d 198, 201 (5th Cir. 1969); *Southern Conference of Teamsters, Local 568 v. Red Ball Motor Freight, Inc.*, 374 F.2d 932 (5th Cir. 1967); *Inter-*

thousands of hours of backpay despite the fact that the Company did exactly what the EEOC had required and a federal district court had ordered it to do.[24] We show

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national Bhd. of Teamsters, Local 249 v. Consolidated Freightways, 464 F. Supp. 346 (W.D. Pa. 1979); *Local 1115, Nursing Home, Hosp., Senior Cit. Hotel Union v. Hialeah Convalescent Home, Inc.*, 348 F. Supp. 405 (S.D. Fla. 1972); *International Union, United Auto., Aero., & Agric. Implem. Wkrs. v. W.M. Chace Co.*, 262 F. Supp. 114 (E.D. Mich. 1966); *Board of Trustees v. AFT, Local 1942*, 103 LRRM 2597 (Conn. Sup. Ct. 1979); *Cook County Bd. of Trustees v. Local 1600*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); *Goodyear Tire & Rubber Co. v. Sanford*, 540 S.W.2d 478, 92 LRRM 3492 (Tex. Civ. App. 1976).

[24] Although the appellate court found Grace liable in the context of enforcing an arbitration award, that is no different from the court reaching its own conclusion on this issue. When a court is confronted with a contention that an arbitrator's award cannot be enforced because it contravenes the law or public policy, the court is not concerned with the normal deference paid to labor arbitrators or whether the award draws its essence from the contract—that is assumed. Rather, the court "is actually concerned with the *lawfulness of its enforcing* the award and not with the *correctness of the arbitrator's decision*" under the contract. *International Union, United Auto., Aero., & Agric. Imple. Wkrs. v. W.M. Chace Co., supra*, 262 F. Supp. at 117 [emphasis in original]. Thus, the issue is whether the court believes that the law or public policy precludes the enforcement of an otherwise valid award, and this determination must be made *de novo* by the reviewing court. *Communications Wkrs. of America v. Mountain States T & T Co.*, —— F. Supp. ——, 18 FEP Cases 281, 284-285 (D.Colo. 1977) (Even if the arbitrator's award regarding the effect of a consent decree on a collective bargaining agreement was validily rendered, the interpretation of the law and its impact on the case is a matter for the court to undertake *de novo*.), *aff'd*, —— F.2d ——, 102 LRRM 2161, 2165 (10th Cir. 1978) ("[E]mployers . . . are entitled to *de novo* judicial review of issues which go beyond the confines of a particular bargaining agreement."); *Telephone Wkrs. Union, Local 827 v. New Jersey Bell Telephone Co.*, 450 F. Supp. 284, 296 (D.N.J. 1977), *aff'd*, 584 F.2d 31 (3d Cir. 1978) (Although the arbitrator did not consider Title VII and the consent decree in his findings, the court must consider the effect of a consent decree on the employer's action.).

In any event, the usual considerations mandating deference to arbitration decisions would not apply to the Barrett award, because

below that the Fifth Circuit's decision on this issue is contrary to established legal principles which are imperative for an orderly administration of the law in general and Title VII in particular.

As pointed out in the Statement of Facts, in late 1973 the EEOC found that Grace had discriminated against women in hiring and job assignments and that the seniority provisions of its labor contract were unlawful because they perpetuated that prior discrimination. When the EEOC pressured Grace to enter into a conciliation agreement to remedy these discriminatory effects and the Union made known its intention to arbitrate any modified application of the seniority provisions, the Company immediately turned to the federal courts, the only forum that could bind all the parties and authoritatively determine the Company's paramount legal obligation. The Company got its answer. The federal district court found that the female employees had failed to obtain earlier employment because of the Company's previous policy of totally excluding women from production jobs, that adherence to the contractual seniority provisions would result in present discrimination against women employees, and that the limited modification of the contractual seniority provisions set forth in the conciliation agreement was necessary to effectuate the goals of Title VII (403 F. Supp. at 1188). Accordingly, the court ordered the Company and the Union to apply the conciliation agreement procedures in making employee layoffs. The Company obeyed that injunction and made layoffs in accordance with the conciliation agreement until the district court's order was vacated in 1978.

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that award in essence vacated the earlier award by Arbitrator Sabella. Hence, in the unique facts of this case, the public policy usually furthered by deference to arbitral awards—the finality of awards and the consequent stability and enhancement of the arbitral process—would actually be undermined by enforcement of the Barrett award.

In reversing the district court's present determination that the Company was not liable for following the conciliation agreement procedure mandated by the earlier court injunction, the Fifth Circuit held that Grace had had no obligation to obey the court order pending appeal because it was eventually reversed in 1978. Thus, the appellate court stated (J.A. 87-88):

> The conclusion reached immediately above [regarding the fact that the earlier Fifth Circuit decision had reversed the district court and had announced the law as it had always existed] settles the contention of the company that the district judge in the original *Southbridge Plastics* case had issued an order which was binding on the company to apply the conciliation agreement rather than the seniority provision of the collective bargaining agreement. . . .
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> . . . [T]his Court's decision reversing the district court in *Southbridge Plastics* in terms forecloses as well the assertion of an obligation to obey the district court order.

With all due respect to the Fifth Circuit, this holding is plainly wrong. As this Court has made abundantly and emphatically clear, court orders must be obeyed until, *not unless*, reversed on appeal:

> [A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. . . .
>
> "An injunction duly issuing . . . must be obeyed by [the parties] however erroneous the action of the court may be. . . . [U]ntil its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

United States v. United Mine Workers of America, 330 U.S. 258, 293-294 (1947), *quoting Howat v. Kansas*, 258 U.S. 181, 189, 190 (1922) [footnotes omitted].

Local 759, which was as bound by the district court order as the Company, did not seek to have the district court or the court of appeals stay the 1975 order. Consequently, until the decision and order were reversed by the Fifth Circuit in 1978, both the Union and the Company were required to abide by it. Had the Company and Union followed the contractual seniority provisions in making layoffs, they would have subjected themselves to penalties for civil and criminal contempt.[25] Such conduct would have been punishable no matter what the outcome of the Union's appeal, because disobedience of court orders is punishable as criminal contempt even though the court's order is later determined to be erroneous and thus set aside on appeal. *Walker v. City of Birmingham*, 388 U.S. 307, 314, *reh. denied*, 389 U.S. 894 (1967); *United States v. United Mine Workers*, *supra*, 330 U.S. at 294; *Cliett v. Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962) ("For in criminal contempt the validity of the order allegedly disobeyed is not open to question in the slightest degree. Disobedience constitutes a contempt even though the order is set aside on appeal or otherwise becomes ineffective.").[26]

As the foregoing cases show, there is no principle more firmly imbedded in our judicial system, nor one more vital to the orderly processes of the law, than the sanctity and inviolability of court orders. And that principle is

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[25] 18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
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> * * * *
>
> (3) Disobedience or resistance to its lawful writ, order, rule, decree, or command.

[26] Indeed, in the proceedings below, the same district court judge who had issued that prior order confirmed that "[i]f the order had been violated in any respect by any of the parties, the parties would have been subject to a contempt action on the part of the Court because of failure to comply with the Court's order." (J.A. 66).

sound, for if one's duty to comply with lower court orders is made to depend upon the eventual affirmation of reviewing courts, then each person subject to a lower court order would find it necessary to take upon himself the responsibility for determining the correctness or incorrectness of the court's decision—in essence, the responsibility to determine "the law." The chaos that would result from such a rule is apparent.

A corollary to the principle that one can be punished for violating court orders later determined to be erroneous is the principle that one should *not* be punished for refusing to do something in violation of an order. This Court recognized a similar principle in *GTE Sylvania, Inc. v. Consumers Union*, *supra*, 445 U.S. at 287, stating:

> There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents. . . . To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly". . . .

Moreover, in *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981), the court's opinion indicates that application of this principle is particularly appropriate in employment discrimination cases. In that case, the Ninth Circuit held that the union was collaterally estopped from claiming damages for nonminority employees who were denied promotions because of a Title VII consent decree, but it went on to add (658 F.2d at 695, 696; footnotes and citations omitted):

> Awarding compensatory relief to the non-minority employees would impose conflicting or inconsistent obligations on the [employer]. Each time the [em-

> ployer] attempted to comply with the affirmative action program by promoting a minority employee, it would have to give an equivalent amount of compensation to a non-minority employee who would have been promoted but for the consent decree. That extra compensation would drastically increase the cost of each promotion and would burden the [employer] for complying with the consent decree. . . .
>
> Moreover, we feel that permitting the [plaintiff] to sue for compensation would be inimical to the policy underlying Title VII of promoting settlements. . . . The [employer] would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the Dennison class plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees.

See also, EEOC v. McCall Printing Corp., 633 F.2d 1232, 1238 (6th Cir. 1980) (Good faith conciliation agreements resulting in consent decrees may not be considered independent acts of discrimination as a matter of law.); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) (An individual cannot be punished for actions protected by a court order that was later determined to be erroneous, since the order stood until it was vacated "and the litigant can hardly be asked to determine at his peril the correctness of the court's decision."); *Telephone Wkrs. Union, Local 827 v. New Jersey Bell Telephone Co., supra*, 450 F. Supp. at 298 (An employee who did not receive a promotion because of an affirmative action program established under a consent decree is not entitled to damages under a labor arbitration award because the employee (through her union) was collaterally estopped from attacking the consent decree and "[i]f every damage claim by a 'faultless employee'. . . is sustained, when the Company attempts to comply with the Consent Decree, the Company is placed in the position of being 'damned if it does, and damned if it doesn't'."), *aff'd*, 584 F.2d 31 (3d Cir. 1978) (on collateral estoppel

ground); *Adcock v. Caddo Parish School Board*, —— F. Supp. ——, 11 FEP Cases 1312 (W.D. La. 1974), *aff'd without published opinion*, 530 F.2d 973 (5th Cir.), *cert. denied*, 429 U.S. 978 (1976) (A school board is not liable for "reverse discrimination" against a white coach where the appointment of the black coach in his stead was in furtherance of the court's prior desegregation order and, "had the Board done otherwise, it would have subjected itself to penalties for contempt of court.").[27]

A second corollary to the inviolability principle is the rule that the improper issuance of an injunction is an error of the court, and that the party injured by the injunction, like the Union here which was enjoined from enforcing its contract, does not have an action for damages. *Russell v. Farley*, 105 U.S. 433, 437 (1882) ("Where no bond or undertaking has been required [before the improper issuance of an injunction], it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the

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[27] The facts in *Local 223, Utility Workers Union of America v. The Detroit Edison Co.*, Case No. 81-70964 (E.D. Mich., So. Div. 1981), are virtually identical to those in the instant case. In the Michigan case, the union sought to compel the arbitration of grievances arising from actions taken by Detroit Edison in compliance with a court order mandating affirmative action which had later been vacated in light of this Court's *Teamsters* decision. In an oral decision rendered on December 11, 1981 (which is printed at pp. 54a-56a of the Appendix to the Petition for a Writ of Certiorari in the instant case), the district court dismissed the union's suit, stating that it would not order Detroit Edison to submit to an arbitration which would cause the company to pay out money for compliance with an enforceable court order. The pertinent facts in the *Detroit Edison* case are indistinguishable from those that were before the Fifth Circuit in the instant case —both cases involved enforceable court orders which were later vacated and unions' attempts to secure damages, through arbitration, for mandated employer actions taken prior to the time the court orders were vacated. We submit that the Michigan court's decision is correct, and that this Court should make that clear by reversing the Fifth Circuit in the instant case.

suit as it may deem equitable and just."); *Buddy Systems, Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1167-68 (9th Cir. 1976), *cert. denied*, 431 U.S. 903 (1977) (In the absence of a bond, there can be no recovery for damages sustained by the wrongful issuance of a preliminary injunction.); *United Motor Services v. Tropic-Aire*, 57 F.2d 479, 483 (8th Cir. 1932) ("The philosophy of the matter is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless the same is sufficiently intentional as to be the basis of a suit for malicious prosecution, otherwise the damage is *damnum absque injuria*.").

In sum, in view of the earlier district court injunction, the Company, and, indeed, the Union and its members, had no choice but to obey that order and follow the conciliation agreement layoff procedures rather than the contractual provisions that the court had determined to be unlawful. By holding to the contrary, the Fifth Circuit has told W. R. Grace and all other employers that if a court orders them to do something that they or their counsel think is incorrect, the appropriate course of action is to ignore the court order. Such precedent obviously cannot stand.[28]

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[28] Since the effect of the Barrett arbitration award (and the Fifth Circuit's enforcement) is to punish the Company for failing to do what could not legally be done in view of the district court injunction, this case is closely akin to those in which courts have refused to enforce arbitration awards which contravene public policy by requiring or sanctioning the commission of an illegal act or by interfering with effective law enforcement. See, *e.g.*, *Local P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, supra*, —— F.2d at ——, 110 LRRM at 2808 (An arbitrator's award upholding the employer's rule forbidding employees from reporting problems to USDA inspectors will not be enforced because it violates public policy.); *Banyard v. N.L.R.B., supra*, 505 F.2d at 347 (The NLRB should not have deferred to an arbitral award which, in effect, granted an employer a license to violate state law by permitting him to require employees to haul overloaded trucks.); *Local 7-210, Oil, Chem. & At. Wkrs. v. Union Tank Car Co.*, 475 F.2d 194 (7th Cir.), *cert. denied*, 414 U.S. 875 (1973) (The court will

Moreover, even in the absence of a court order, the Congressional policy favoring voluntary compliance and conciliation of employment discrimination claims dictates that the Fifth Circuit's judgment be reversed.[29] To ef-

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not enforce an arbitration award requiring an employer to apply a union contract to a new plant and to make employees whole for violation of the recognition clause of that contract where the NLRB had determined that the employees at the new plant were represented by a different union and the company did not apply the first union's contract because it could not legally do so.); *New Orleans Typographical Union, No. 17 v. N.L.R.B.*, 368 F.2d 755 (5th Cir. 1966) (The court will not enforce an arbitration award giving work to one union where the NLRB subsequently ruled that the work should be awarded to another union.); *International Bhd. of Teamsters, Local 249 v. Consolidated Freightways, supra* (An arbitration award upholding the company's right to compel its employees to violate the law is plainly contrary to public policy and must be vacated.); *Local 1115, Nursing Home, Hosp., Senior Cit. Hotel Union v. Hialeah Nursing Home, Inc., supra*, 348 F. Supp. at 414 (Even if the arbitrator did not exceed his authority in issuing an award, the court "would be loath to grant enforcement to an arbitration award which undermined administration of the wage and price control system." (dictum)); *Cook County Bd. of Trustees v. Local 1600, supra* (An arbitration award that had the effect of benefitting unlawful strikers at the expense of nonstrikers must be vacated as being repugnant to public policy.); *Goodyear Tire and Rubber Co. v. Sanford, supra* (An arbitration award which encouraged delay in reporting violations of law will not be enforced because it contravenes the public policy disfavoring conduct which tends to interfere with effective law enforcement.).

[29] In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 47 (1974), this Court recognized that the elimination of discrimination was to be given the "highest priority" and that

> [c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby . . . the Commission . . . would have an opportunity to settle disputes through conference, conciliation and persuasion. . . .

See also, *e.g.*, *Ford Motor Co. v. EEOC*, —— U.S. ——, 29 FEP Cases 121, 125 (1982); *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) ("[I]t is essential . . . that negotiation remain the primary mode of enforcement, lest the Commission's

fectuate that policy, employers should be insulated from liability for actions taken in good faith compliance with a *bona fide* conciliation agreement that the EEOC has determined, under prevailing law, to be necessary to remedy Title VII violations.[30]

Not only have various district courts so held in interpreting Title VII and its impact on union contracts,[31]

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energies be dissipated in interminable litigation in the Federal courts, which, whatever the outcome, would be detrimental to efficient and effective implementation of Title VII."); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (The "central theme of Title VII is 'private settlement' as an effective end to employment discrimination.").

[30] Both Arbitrator Sabella (J.A. 47) and Arbitrator Barrett (J.A. 56) specifically found that Grace had operated in complete good faith in attempting to ascertain the requirements of the law and to act in accordance with those requirements.

[31] See *Freeze v. ARO*, 503 F. Supp. 1045 (E.D. Tenn. 1980) (Where an employer's conciliation agreement with OFCCP required the employer to abrogate its union contract provisions by giving employees plant-wide seniority, the employer's actions in so doing could not be the basis for a Title VII claim and he would not be required to arbitrate grievances based on actions taken pursuant to the conciliation agreement.); *Savannah Printing Spec. & Paper Prod. Local Union v. Union Camp Corp.*, 350 F. Supp. 632 (S.D. Ga. 1972) (Where the OFCCP required the employer to change from job seniority to divisional seniority as part of its affirmative action compliance program, the requirements imposed by OFCCP superseded the conflicting union contract provisions, and the employer would not be required to arbitrate grievances of employees laid off under the new seniority system who would have been retained under the old seniority system.). *See also Dennison v. City of Los Angeles, supra*, 658 F.2d at 696 (If employees disadvantaged by a Title VII consent decree were permitted to sue for compensation, it "would be inimical to the policy underlying Title VII of promoting settlements," since if the employer entered into the decree he would be subject to suits by nonminority employees and if he refused he would be subject to suits by Title VII plaintiffs.); *Coca Cola Co. v. FTC*, 475 F.2d 299, 304 n. 6 (5th Cir.), *cert. denied*, 414 U.S. 877 (1973) ("[W]e are 'astonished' at the 'proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative

but these decisions are consistent with the principles that have evolved under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"), to which Congress looked for guidance in developing Title VII remedies. *E.g., Ford Motor Co. v. EEOC, supra*, 29 FEP Cases at 124 n. 8; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). Thus, the policy under the NLRA strongly disfavors an award of backpay to those denied employment by an employer's attempt to comply with a decision of the National Labor Relations Board.[32]

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agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute.' ").

[32] For example, when two groups of employees seek the same work with one employer (a "jurisdictional" dispute), the NLRB issues a "10(k)" determination of who should perform the work which "[n]either the employer nor the employees to whom he has assigned the work are legally bound to observe. . . ." *N.L.R.B. v. Plasterers, Local 79*, 404 U.S. 116, 127 (1971). See also *Int'l Union of Operating Engineers, Local 714 v. Sullivan Transfer*, 650 F.2d 669, 672 n. 10 (5th Cir. 1981); *Brady-Hamilton Stevedore Co.*, 198 NLRB 147 (1972). Nevertheless, courts routinely hold that employees who have been denied work in accordance with the Board's 10(k) determination are not entitled to pay in lieu of work even if those employees can successfully claim that their employer breached its collective bargaining agreement by not providing the work to them. *E.g., Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964) (Even where the Court would order arbitration of the resulting pay dispute, it would not enforce an arbitrator's decision which awarded backpay to employees denied work because their employer awarded the work as directed by the NLRB.); *Int'l Union of Operating Engineers, Local 714 v. Sullivan Transfer, supra* (The NLRB's work assignment to one group of employees forecloses a recovery of damages by the union representing employees who were denied the work.); *United Auto Workers v. Rockwell International Corp.*, 619 F.2d 580 (6th Cir. 1980) (The court will dismiss the union's suit for backpay for its member to whom an arbitrator had awarded disputed work under the union contract, because the NLRB subsequently ruled that other employees were entitled to the work and the federal policy favoring peaceful settlements of jurisdictional disputes by the NLRB outweighs the policy favoring the enforceability of collective bargaining agreements

And these same rules should obtain even when it later turns out that the EEOC (or the NLRB) was wrong in determining that the particular remedial action was necessary.[33] For where, as here, the EEOC's determination was based on the "unanimous conclusion" of the courts of appeals later overturned by this Court in *Teamsters* (see n. 5, *supra*), that earlier precedent cannot justly be ignored. As this Court stated in *Lemon v. Kurtzman*,

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and arbitration awards interpreting such agreements.). Moreover, in such case, the NLRB finds no violation and no backpay owing to employees discharged by the employer in compliance with the Board's work assignment. *Brady-Hamilton Stevedore Co., supra.*

Even more to the point, the NLRB, from its inception to the present, has ordered that employees or applicants discriminatorily denied employment must be offered immediate employment and that the employer must, if necessary, lay off or discharge employees who have replaced the discriminatees. See, *e.g., The Timken Silent Automatic Company*, 1 NLRB 335, 345-46 (1936) ("[T]he men who have thus been illegally supplanted must be returned to work, even though men hired . . . should have to be displaced."); *Phelps Dodge Corporation*, 19 NLRB 547, 603, *enf'd as mod.*, 113 F.2d 202 (2d Cir. 1940), *modified and remanded*, 313 U.S. 177, *original order reconfirmed*, 35 NLRB 418 (1941) (The employer was ordered to "[o]ffer the [discriminatees] immediate and full reinstatement . . . , dismissing if necessary all employees hired since [the date the employees applied for reinstatement or jobs]."); *E. I. DuPont de Nemours and Company*, 262 NLRB No. 126 (July 20, 1982) (The employer was ordered to "[o]ffer [the discharged discriminatees] immediate and full reinstatement . . . , dismissing, if necessary, anyone who may have been hired or assigned to perform . . . their work . . . ."). And, to our knowledge, those dismissed or laid-off employees have never successfully claimed backpay as a result of their dismissal or layoff. *Cf., N.L.R.B. v. Tennessee Products & Chemical Corp., Roane El. F. Div.*, 329 F.2d 873 (6th Cir. 1964). Nor could they so claim under this Court's decision in *Carey v. Westinghouse Electric Corp., supra.*

[33] Indeed, by its very nature conciliation will usually take place at a time when all of the facts in support or defense of a plaintiff's Title VII claim will not be available or fully explored. If absolute certainty of the validity of the claim, as a matter of fact and of law, is required to avoid future liability, the conciliation process will be converted to a fruitless ritual.

411 U.S. 192, 199 (1973), "judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." [34]

That conclusion is especially important in the context of employment discrimination laws, where Congress intended that the primary mode of enforcement be through the EEOC's efforts to conciliate and voluntarily settle claims of discrimination. For no employer could ever be expected to conciliate employment discrimination claims if its actions taken pursuant to EEOC directives, although apparently required by prevailing law, may later subject the employer to arbitration decisions requiring massive retroactive backpay if the prevailing law changes and such remedial actions are no longer required by Title VII.

Like the Fifth Circuit's decision that was reversed by this Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), its instant decision places the employer on a "high tightrope without a net" and "places voluntary compliance with Title VII in profound jeopardy." 443 U.S. at 209-210 (Blackmun, concurring). If an employer faced with a reasonably clear finding of Title VII violations conciliates the alleged violations, he is subject to suits by incumbent employees adversely affected by the

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[34] See also *Chicot Co. Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), where, in discussing the effect of actions taken under a statute later determined to be unconstitutional, this Court stated:

> The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

conciliation provisions; yet if he refuses to conciliate, he is subject to years of litigation and accruing backpay on the Title VII cliams. And he is powerless to resolve this dilemma since the Fifth Circuit's decision puts the union always in a position to frustrate conciliation at no risk to itself or its members.[35]

Such a result is totally at odds with Title VII policy favoring conciliation over litigation. Indeed, the only way that a unionized employer can be expected to comply with the Congressional policy favoring voluntary Title VII compliance is if this Court reverses the Fifth Circuit's decision below and thereby re-establishes the principle that employers and unions are to be encouraged, rather than discouraged, to negotiate and conciliate equal employment opportunity claims.[36] Thus, such a reversal by this Court will establish the proposition that an employer may enter into a *bona fide* conciliation agreement with

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[35] An employer's dilemma may well be exacerbated by this Court's decision last term in *Zipes v. Trans World Airlines*, —— U.S. ——, 71 L. Ed. 2d 234, 247-248 (1982). *Zipes* made clear that a union itself need not be found guilty of discrimination in order to award seniority relief inconsistent with its collective bargaining agreement. Accordingly, the EEOC and Title VII claimants will seldom feel compelled to join unions in Title VII suits and employers' resistence to conciliation on the basis of conflicting contractual provisions will be given short shrift by those plaintiffs. But despite the fact that the union need not be joined, under the Fifth Circuit's decision in this case it will always be in the background, demanding arbitration and raising the possibility of massive retroactive contract liability if the employer conciliates with the EEOC.

[36] Just last term this Court recognized the importance of a rule which gives employers an incentive to take curative steps to eliminate employment discrimination. *Ford Motor Co. v. EEOC*, *supra*, 29 FEP cases at 125 ("To accomplish this objective [of achieving equality of employment through cooperation and voluntary compliance], the legal rules fashioned to implement Title VII should be designed . . . to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation. . . .").

the EEOC and will be free from liability under its labor agreement until such time as the union convinces a court that the requirements of the conciliation agreement should be stayed, modified or set aside.

Such a rule will provide an incentive to unions, as well as employers, to become involved in the conciliation process itself. If the union is not prepared to reach agreement with the EEOC but the employer nonetheless enters into an EEOC conciliation agreement, the union will not be able to frustrate that agreement by gaining ultimate court enforcement of conflicting arbitration awards. Rather, if the union believes that the encroachments of the conciliation agreement on its contract rights are unnecessary to effectuate Title VII, it can commence an action challenging the agreement in a judicial forum —the appropriate forum for determining Title VII requirements—and seek to stay the effect of such an agreement by posting a bond to cover damages to Title VII claimants should the union's objections turn out to be meritless. Only if a union is required to bear such risks, will it have an incentive to conciliate or at least to refrain from raising meritless objections frustrating conciliation. However, the union will still maintain the right to raise legitimate objections at its own—rather than at the employer's—risk. And, of course, an employer's incentive to conciliate rather than to litigate will be protected.

In summary, the facts of this case show that Grace did everything it could conceivably do to determine the requirements of the law and to act accordingly. The EEOC's findings of prior sex discrimination were, for all practical purposes, irrefutable and its determinations regarding the effect of the contractual seniority provisions were certainly justifiable in light of prevailing law. Nevertheless, the Company took additional steps and went to federal court for a judicial determination of the accuracy of the EEOC's findings and conclusions. And when that determination was made, the Company fol-

lowed the court's mandate in shaping its conduct over the succeeding two years. Surely, in these circumstances, Grace should not be held liable because the EEOC and lower federal court were wrong. The Fifth Circuit's contrary determination not only has serious detrimental implications for voluntary Title VII compliance, it also, more importantly, denigrates the authority of the federal judiciary to issue binding court orders which the parties must respect and obey. Accordingly, its judgment should be reversed.

CONCLUSION

For the foregoing reasons, Grace prays this Court to reverse the judgment of the Fifth Circuit and vacate the Barrett arbitration award.

Respectfully submitted,

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. R. GRACE AND COMPANY,
Petitioner,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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BRIEF FOR RESPONDENT

The opinions below and the basis of this Court's jurisdiction are set out at pp. 1-2 of the brief for petitioner, W. R. Grace and Company (hereafter Co. Br.). The text of the statutes involved are set out in the appendix to this brief.

COUNTER-STATEMENT OF THE CASE

This case concerns the interplay between the system of collective bargaining set out in the National Labor Relations Act, as amended, and the system for prohibiting employment discrimination based on race, creed, color, sex or national origin set out in Title VII of the Civil Rights Act of 1964, as amended. To understand the genesis of the dispute at hand, it is necessary therefore to understand its background in the collective bargaining

relationship between the Company and the Union as well as its background in the 1972 discrimination charges filed against the Company with the Equal Employment Opportunity Commission. In its statement, the Company barely mentions the collective bargaining background. The Company does outline its version of the basic facts concerning the train of events beginning with the EEOC charges, but this recitation, in our view, is too incomplete and too summary to explain what happened in what sequence and why. For these reasons, we restate the facts in full.

1. The 1972 EEOC Charges Against the Company

In 1972, two black males filed charges with the EEOC alleging that the Company had discriminated on account of race by refusing to hire them. (JA3). The charges triggered an investigation by the EEOC's Jackson, Mississippi office which culminated in a "reasonable cause" determination by the EEOC's District Director dated October 5, 1973. (JA 2-9).

Although the charges had not alleged sex discrimination, the District Director, in the course of investigating those charges, examined the status of women in the Company's work force. The District Director found reasonable cause to believe that "prior to 1970" the Company had discriminated against women in hiring (JA 8),[1] and went on to find reasonable cause to believe that the seniority system provided for in the collective bargaining agreement between the Company and the Union—which used length of plant service as the seniority measure—

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[1] As is the norm in an industrial plant setting, the Company had sole control of hiring and of initial placement of new hires in the jobs at the Corinth plant. The District Director found that after 1970 the Company had hired women in significant numbers, but had discriminatorily assigned them only to jobs in its clerical department (JA 7-8). That finding had no significance to subsequent events, as the conciliation agreement provided no remedy for the women assigned to the clerical department.

perpetuated the effects of that pre-1970 hiring discrimination (JA 6-8). The latter finding was predicated upon a view then embraced by the EEOC—one that the courts of appeals had by that time discredited [2]—that where there has been a history of prior hiring discrimination against a group, followed by recent hirings of individuals in that group, it violates Title VII to use plant seniority as the determinant of priority for job assignments and job retention. Under that EEOC view, Title VII required in such a situation, *inter alia*, that an employer implementing a reduction in force not reduce the percentage of employees at work who are members of the previously-discriminated-against group even though the beneficiaries (the recently-hired employees in that group) were not themselves victims of the prior hiring discrimination.

The sole legal effect of the District Director's "reasonable cause" determination was to entitle the EEOC to "endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion". Section 706(b), 42 U.S.C. § 2000e-5(b).[3] In accordance with this statutory scheme, the District Director, in her October, 1973 "reasonable cause" determination, "invite[d]" the parties to engage in conciliation (JA 9). Fourteen months elapsed before the Company's entry into a conciliation agreement.

2. The 1974 Collective Bargaining Negotiations Between The Company and the Union, and Their Aftermath

The 1971-74 collective agreement between the Company and Union expired on March 30, 1974. As that expiration date approached, the Company and Union entered into negotiations for a new agreement. Negotiations deadlocked, and the employees struck in support of their demands. During the strike, the Company hired new employees to perform the strikers' work. The Company,

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[2] See *infra*, pp. 35-36 n.29.

[3] See *infra* pp. 37-38.

which had not previously hired women for jobs within the bargaining unit, did hire women to perform those jobs during the strike.[4]

In late May, 1974, the Company and the Union resolved their differences, signed a new collective bargaining agreement, and the Union ended the strike. The agreement signed in 1974 was for a three-year term, and continued the plant seniority system in effect without material change.[5] The strikers returned to work, but the Company also retained the strike replacements.[6]

Immediately after the agreement was signed the Company began assigning jobs in the plant in a manner that preferred women who had been hired during the strike over men who were senior to those women. In particular, although the collective agreement provided that shift preferences were to be allocated on the basis of plant seniority, the Company took the position that no male employee could exercise his shift preference seniority to obtain a job or shift held by a female employee.[7] The effect of the Company's stand—which corresponded with the provisions *later* adopted in its conciliation agreement with the EEOC—was to give strike replacements "a form of super seniority" (JA 49) at the expense of strikers.[8]

The men who were adversely affected by the Company's departure from seniority filed grievances alleging that

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[4] Joint Appendix to Fifth Circuit in *Southbridge Plastics* v. *Local 759*, No. 75-4416 (hereinafter *"Southbridge JA"*) at 73-74, 85; Transcript of Hearing in *Southbridge Plastics* v. *Local 759*, Civ. No. 74-905 (N.D. Miss.) at 3-4, 9-10.

[5] JA 22-29.

[6] See sources n.4, *supra*.

[7] JA 24; *Southbridge* JA (see n.4, *supra*) at 11-12, 16, 95, 105-106, 111.

[8] Such a preference is forbidden by the National Labor Relations Act. *NLRB v. Erie Resister Co.*, 373 U.S. 221.

their rights under the collective agreement had been violated. These grievances were processed without success through the steps of the grievance procedure. The Union then requested that the Company join with the Union, as the agreement required, "to select an impartial Arbitrator".[9]

3. The 1974 Lawsuit And The Negotiation Of The Conciliation Agreement

The Company refused to permit the grievances to be arbitrated, and instead, on July 24, 1974, instituted a lawsuit in federal district court. That lawsuit was brought under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, named the Union as the sole defendant, and sought an injunction against arbitration of the pending seniority grievances. The complaint alleged that the EEOC had found "reasonable cause to believe" that the seniority provisions of the collective agreement were unlawful, and the complaint requested that arbitration be enjoined while the Company negotiated a conciliation agreement with the EEOC.[10] The Union counterclaimed for an order compelling arbitration of the grievances.[11]

On December 11, 1974, while the lawsuit was pending, and without any action having been taken by the district court, the Company entered into a conciliation agreement with the EEOC. The parties to the agreement were the two black job applicants who had filed the EEOC charges, the Company and the EEOC. The Union declined to enter into the conciliation agreement, insisting that the collectively-bargained seniority provisions were lawful, and that the contrary terms of the conciliation agreement were unlawful or, in any event, were not required by Title VII.

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[9] JA 31.

[10] *Southbridge* JA (see n.4, *supra*) at 1-6.

[11] *Id.* at 7-14.

Paragraph 1 of the conciliation agreement recited:

> "It is understood that this agreement does not constitute an admission by the respondent [i.e. the Company] nor a finding of any violation of Title VII of the Civil Rights Act of 1964 as amended * * *" [JA 10]

The conciliation agreement created an "affected class" consisting of all "persons of the female sex" (JA 12). Under the heading "seniority", the Company agreed that "notwithstanding any provision" of its collective agreement with the Union, (1) "[n]o female employee . . . will be removed from her job or shift by a male employee by utilization of the shift preference provisions of [the] collective bargaining agreement," and (2) layoffs would be made in such a manner that the percentage of female employees would not be smaller following layoff than the percentage of female employees had been before the layoff (JA 15-16).

At the time the conciliation agreement was executed, there were 31 women in the bargaining unit and 454 men, a ratio of 1:15.[12] Under the terms of the conciliation agreement, therefore, the Company could lay off only one woman for every 15 men who were laid off. As all of the women had been hired during or after the 1974 strike, the effect of the conciliation agreement during the period of its implementation was that each time a layoff occurred, men with substantial seniority would be laid off, while women with only a few months' seniority would be retained.

There is no evidence (either in the original lawsuit or the present one) that any of the women who were beneficiaries of this preference had themselves been victims of the pre-1970 hiring discrimination that the preference was designed to "remedy." Indeed, two-thirds of the women who were entitled to preferences were in their teens and twenties, and many had not been of working

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[12] *Southbridge* JA, at 75-86.

age at the time that the Company's policy of hiring discrimination was alleged by the EEOC to have been in effect.[13]

Following the signing of the conciliation agreement, the Company filed an amended complaint in its pending lawsuit, contending that the seniority provisions of the collective agreement were superseded by the quota provisions of the conciliation agreement.[14] The amended complaint named the EEOC as an additional party, and alleged, inter alia:

> Where the terms of the Conciliation Agreement entered into by the [Company] and by the [EEOC] are in conflict with the terms of the collective bargaining agreement entered into by the [Company] and the [Union], the terms of the Conciliation Agreement must govern the procedures to be followed by the [Company]".[15]

The EEOC filed a responsive pleading agreeing with the Company, together with a cross-claim and counterclaim.[16] The EEOC moved for summary judgment, seeking a declaratory judgment that the conciliation agreement was superior to the conflicting terms of the collective agreement; the Union cross-moved for summary judgment di-

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[13] The Company was alleged by the EEOC to have discriminated in hiring "prior to 1970" (JA 8). Of the 31 women hired between May and September, 1974, who were still on the payroll in October, 1974, one (Debra Campbell) was only 18 years old in 1974; two (Linda Bickerstaff and Annie Pollard) were 19; one (Pamela Adams) was 20; two (Mary Gunn and Channie Triplett) were 21; fourteen others were in their 20's, five in their early 30's, three in their 40's, and one was 55. The age of two is not indicated in the record. *Southbridge* JA (see n.4, *supra*) at 73-74, 85-86.

[14] *Southbridge* JA 91-98.

[15] *Id.* at 97.

[16] *Id.* at 114-130.

recting the Company to arbitrate the pending grievances.[17]

The district court did not act on the case until November 3, 1975. (Thus, an additional eleven month period ensued between the signing of the concilation agreement and the district court's order). In the interim, the Company laid off employees in accordance with the conciliation agreement rather than in accordance with the collective agreement. And men who were laid off in violation of their seniority rights under the collective agreement filed grievances alleging the violation of those rights. Two of the three grievances that were decided in Arbitrator Barrett's award—the award whose validity is the subject of the instant suit—involved layoffs during this period (i.e. after the signing of the conciliation agreement but prior to the entry of the district court order). (JA 48, 51.)

The district court's memorandum of decision provided that summary judgment should be granted to the EEOC and should be denied to the Union. That court concluded that "the limited modification of that portion of the collective agreement which the employer and the EEOC seek, as reflected in* * * the Conciliation Agreement, is necessary to effectuate the goals of Title VII." 403 F. Supp. at 1188. The district court reasoned, accordingly, that the arbitration sought by the Union should not be allowed: The "arbitrator should not and could not go beyond the bounds of the collective bargaining agreement in solving the dispute before him [and thus would] be unable to consider the effect of Title VII upon the relative rights of the parties * * *. Arbitration under these conditions would be futile and pointless." *Ibid.*

The district court's memorandum opinion did not specify what relief was to be entered pursuant to the grant of the EEOC's motion for summary judgment. Rather,

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[17] *Id.* at 131-132, 123-124, 129-130; 137.

the court directed "counsel for the EEOC and Southbridge [to] prepare and submit to the court, within twenty (20) days, a joint proposed order for entry by the court embodying the disposition of the motions sub judice as set forth heretofore." *Id.* at 1188.

Twenty-three days later, the district court entered its order, declaring that the terms of the conciliation agreement were "binding upon the parties to this action," and that to the extent that the provisions of the collective agreement conflict with the conciliation agreement "the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby." (JA 44.)

The Union appealed the district court's decision and order to the Fifth Circuit. No party sought a stay pending appeal. During the period between entry of the district court's order (November 26, 1975) and the Fifth Circuit's reversal thereof (January 9, 1978) the Company instituted additional reductions in force in which senior male employees were laid off or demoted, and junior female employees preferred, all as provided for in the conciliation agreement. Again, affected male employees filed grievances alleging that the actions taken during this period violated the collective agreement. One of the three grievances decided by Arbitrator Barrett in the award challenged in this case involved a layoff occurring during this period (JA 51).

While the appeal was pending before the Fifth Circuit, the preference accorded female employees under the conciliation agreement was due to expire by its terms:

> Numbered item 25 of this Agreement will expire on March 20, 1977 unless renewed by agreement of the Respondent and the Equal Employment Opportunity Commission. [JA 16]

Prior to the scheduled expiration date, the EEOC and the Company met, and without notice to the Union, agreed to extend the duration of paragraph 25. Also in

March, 1977, the Company and Union signed a new collective agreement to succeed the expiring 1974 collective agreement. The seniority provisions of the new agreement were identical in all material respects to those of the 1974 agreement.[18]

In January, 1978, the Fifth Circuit reversed the district court's order. The appellate court reiterated its previously-established rule that a union's seniority system can be superseded over the union's objection "only to the extent necessary to assure compliance with Title VII", 565 F.2d at 916,[19] and found that the changes in seniority wrought by the conciliation agreement were *not* "necessary to assure compliance with Title VII," as there was no showing on the record of this case that any of the female employees who were beneficiaries of the preferences contained in the conciliation agreement had been prior victims of discrimination, *id.* at 916-917. For the latter proposition, the appellate court cited this Court's then-recent decision in *Teamsters v. United States*, 431 U.S. 324, although (as explained *infra*, pp. 35-36, n.29), the same conclusion would have flowed from the Fifth Circuit's own pre-*Teamsters* decisions. The Fifth Circuit vacated the district court's order, and declared:

> [W]e grant the union's counter-claim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the Agreement. [565 F.2d at 917]

Neither the Company nor the EEOC sought review by this Court of the Fifth Circuit's decision. Promptly upon its issuance, the Company reinstated male employees to the positions to which they were entitled under the col-

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[18] Compare JA 22-29 with JA 34-41.

[19] Citing *Stevenson v. International Paper Co.*, 516 F.2d 103, 118 (5th Cir. 1975); *Myers v. Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977), amended and modified on other grounds, 556 F.2d 758 (5th Cir. 1977).

lective agreement, thus ending *prospectively* the preference accorded by the conciliation agreement to junior female employees. There remained, however, pending grievances that were not mooted by this prospective correction, for the affected employees were seeking backpay for the earnings lost by reason of the prior departures from the seniority provisions of the collective agreement.

4. The Sabella Award

The first grievance to reach arbitration was that of employee Albert L. Jowers, who complained that he had been demoted in 1976—while the district court's order was in effect—whereas his contractual seniority would have protected him against demotion (and required the demotion of a junior woman instead). Jowers contended that under the agreement he was entitled to backpay for earnings lost as a result thereof. The grievance was heard by Arbitrator Anthony J. Sabella, who issued an opinion and award on August 17, 1978 providing in pertinent part as follows:

> It was stipulated that grievant had more seniority than the female who was retained . . .
>
> * * * *
>
> * * * The facts clearly show that the Employer went by the Conciliation Agreement as it felt it was bound to do by the district court's order . . . .
>
> * * * *
>
> Unquestionably *in the period of violation* the employer was acting in concurrence with the district court's order, as it was required to do. There is no evidence that the employer was not acting in good faith in accordance with a legal court order. The employer could not anticipate nor was it required to anticipate the circuit's reversal.
>
> It would be inequitable and manifestly unfair to penalize the employer under these circumstances. The award is: The grievance of Albert L. Jowers, # 78-7 is denied. [JA 46-47; emphasis added].

The Sabella award does not refer to any provision of the collective agreement, other than the seniority provision which he recognized the Company had violated ("in the period of violation").

5. The Barrett Award

The Union did not file suit to set aside Arbitrator Sabella's award. The Union did, however, process to arbitration three grievances filed by other employees. One of those grievances, like the grievance decided by the Sabella award, involved a layoff occurring while the district court's order was in effect. The other two grievances involved layoffs occurring prior to the entry of the district court's order. (JA 51.) The Company joined in the submission of these grievances to arbitration, and they were heard on a consolidated basis by Arbitrator Gerald A. Barrett, a former president of the National Academy of Arbitrators.[20]

The Company argued to Arbitrator Barrett that he was bound by the Sabella decision. Barrett rejected that argument. He construed the "final and binding" provision of the parties' collective agreement to mean that a prior arbitration award "is not only final and binding upon the parties in the immediate dispute, but additionally should be followed in all future like disputes between the same parties under the same contract . . . so long as the [prior] award does no obvious violence to their contract". (JA 53.) But Barrett concluded that this principle did not foreclose independent determination of the grievances before him because the Sabella award "is wholly at variance with the contract and with the Arbitrator's jurisdiction . . ." (JA 54.) In this respect, Barrett noted that the authority of arbitrators under this collective agreement is narrower than that normally accorded in such agreements, in that the agreement here declares that the Arbitrator is "con-

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[20] See *Proceedings of the Twenty-Fifth Annual Meeting, National Academy of Arbitrators* 283 (BNA, 1972).

fined exclusively" to interpreting the "express" provisions of the agreement, and that the Sabella award was premised solely on a conclusion—that it would be "inequitable and manifestly unfair to penalize the Employer"—that was not referenced to any provision of the agreement. Barrett concluded this portion of his analysis as follows:

> "The ruling of the Arbitrator that it would have been inequitable and manifestly unfair to penalize the Employer, is wholly unsupported by any express provision of the contract, and there is no contention to the contrary either by the Arbitrator in # 78-7 [i.e. Sabella] or by the Company throughout this proceeding. The Arbitrator in # 78-7 thus failed, as he was enjoined by the contract, to 'confine' himself 'exclusively' to the interpretation and application of any 'express' provision of the contract. By so failing, and by fashioning a decision based upon equity utterly unrelated to any provision of the contract, he acted without his authority and jurisdiction as defined in the contract. There is consequently no interpretation or application in # 78-7 to be followed in this proceeding, and this Arbitrator to be consistent with his contractual authority and jurisdiction must necessarily ignore # 78-7 and instead resort to the applicable express provisions of the contract. [JA 55-56.]

Turning to the merits, Arbitrator Barrett stated "the Company does not dispute that it violated its contract with the Union while following its Conciliation Agreement". (JA 56.) Barrett concluded that the Company, "which elected to assume the risks of its decision in 1974 to sign an EEOC Conciliation Agreement which in part abrogated its agreement with the Union . . . may not now validly complain of the unforeseen consequences of that 1974 decision". (JA 56.) Because the Company's entry into the conciliation agreement was the cause of the layoffs of the senior employees whose grievances were before Barrett, and those layoffs were

contrary to the seniority provisions of the agreement, he determined that the Company was obliged to compensate the laid off employees for "lost pay, lost seniority, and any other lost rights". (JA 57.)

6. The Present Lawsuit

The Company thereupon instituted this § 301 action against the Union seeking to overturn the Barrett award. The Company attacked the award's validity on two grounds: (1) that the Sabella award precluded Arbitrator Barrett from independently determining the merits of the grievances before him, and instead required Barrett to rule in the Company's favor; and (2) that as a matter of law an arbitrator cannot award backpay for a contractual breach that was committed in obedience to a later-overturned court order.

The district court found merit in both of the Company's contentions, and set aside the Barrett arbitration award. (JA 58-69.) The Union appealed, and the Fifth Circuit reversed and reinstated the award (JA 70-90.)

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The first question presented in this case is whether under the principles stated in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, the arbitration award rendered by Arbitrator Gerald A. Barrett—the only arbitration award challenged here—should be set aside. From the beginning, the Company has suggested that this question should not be viewed directly but should be viewed on an obtuse angle created by the prism of an earlier arbitration award rendered by Arbitrator Anthony J. Sabella.

In the lower courts the Union did not take issue with this suggestion but rather argued that if the Company is allowed its premise the Barrett award still should not be set aside. Indeed, in this Court the Company states that the Union did more—that in oral argument in the

court of appeals union counsel conceded that the Company had suggested *the* proper method of analysis. (Co. Br. 8, n.7).[21]

This case, we recognize, is further complicated by the court of appeals' conclusion that the Barrett award should be refracted not through the Sabella award but through that court's earlier decision in *Southbridge Plastics Div. v. Local No. 759, Etc.*, 565 F.2d 913 (5th Cir. 1978)—a case brought by the Company to preclude any arbitration of the grievances here. In the decision below, the Fifth Circuit opined that (JA 85-86):

> In the last paragraph of [the Circuit's first decision], quoted above, we withdrew from the authority of the arbitrator any right to decide that the employer had not breached the contract and, therefore, was not liable to the employees for having followed the conciliation agreement. It was determined by the specific holding that the employer had breached the contract. Our interpretation of the contract is res judicata and is binding. Arbitrator Sabella's decision is directly contrary to our holding. He specifically found no breach. This Court's binding decision left as the only issues before the arbitrator which employees had been victims of the breach and damages for the breach. Our holding meant the arbitrator was no longer free to decide whether the employer should be liable for a breach or not.

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[21] There are three reasons why this "concession" should not control here. One, the concession, if made, was wrong and should not be embodied in this Court's authoritative exposition of the national labor policy. Two, the Fifth Circuit's opinion shows that the court below did not rely on any such "concession." Three, it is not all certain that there was a "concession," or if there was one, how it was phrased. The only person for the Union in the Fifth Circuit courtroom at the oral argument in this case was Robert W. Sneed. Mr. Sneed no longer represents the Union and is no longer associated with the firm that represents the Union. Present counsel for the Union have talked to Mr. Sneed and he has advised us that he does not remember whether any such concession was made.

The time has come, we submit, to look straight at the Barrett award and to judge that award in natural light. The two alternative approaches just outlined have had the effect on sound legal analysis that looking through Alice's looking glass has on our sense of reality—both have distorted what experience and logic tell us is true.

We freely admit that the Fifth Circuit's rationale quoted above cannot withstand analysis. A judicial decision that a grievance is arbitrable does not bind the arbitrator in deciding the grievance on the merits. The nature of that court's error is detailed in the Company's brief and we merely reproduce the essence of that discussion here and note that the Company's analysis on this point is, in our view, correct:

> * * * [T]he Fifth Circuit has now stated in the instant case that its 1978 ruling on the Union's counterclaim seeking to compel arbitration conclusively determined the question of contract violation and hence withdrew that issue from Arbitrator Sabella. In so holding, the appellate court acted contrary to the law of this Court and the established precedent of every circuit court in the federal judicial system.
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> * * * [T]his Court has stated that the question whether a labor agreement has been violated "is a question for the arbiter, not for the courts" (*United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. 585) * * *. Every other circuit court in the country has acknowledged and followed this Court's mandate. [Co. Br. 17-19; footnotes omitted.]

But the Company's own approach is equally wrong: resolution of the question whether the *Barrett* award should be set aside does not turn on whether the *Sabella* award would or would not have survived judicial challenge. Sections 301 and 203(d) of the Labor Management Relations Act do not mandate a broad principle of arbitral *stare decisis* applicable generally or a narrower principle applicable to the Sabella and Barrett awards.

Under *Enterprise*, so long as the Barrett award "draws its essence" from the collective agreement, that award should not be set aside, and that result obtains whether or not the Barrett award is in "conflict" with the Sabella award. The question whether to follow a prior award is a contract question and like all such questions is "finally" committed to the arbitrator not to the courts; and so long as the arbitrator's resolution of that question draws its essence from the collective agreement, it is not subject to judicial invalidation. As we show in Part I, the Barrett award meets the test of *Enterprise*.

2. The Company and the EEOC argue that the Barrett award should not be enforced because the award would "punish[] the Company for complying with an enforceable court order" (EEOC Br. 21). Both contend that some source of law external to the contract should preclude contract liability where performance is prevented by a court order. But the question whether the district court's erroneous order excused the Company from liability for its breach of the collective agreement is one of contract law turning on contract interpretation. And the parties to that agreement have commited exclusively to the arbitrator the task of contract interpretation. In performing that task Arbitrator Barrett rejected the argument that the erroneous court order excused the Company from liability for its breach. As to this issue, again, the Barrett award more than satisfies the *Enterprise* test. The award is supported by general principles of contract interpretation—"Impossibility caused by a judiical order prohibiting performance will excuse a party's performance only if the fault of the party owing performance did not contribute to the order" (*Lowenschuss v. Kane*, 520 F.2d 255, 265-67 (2d Cir. 1975)—and represents the most reasonable construction of the express savings clause of the collective agreement.

3. The Company and the EEOC argue that the Union's contract with the Company, and thus the Barrett award

based on that contract, must as a matter of law give way to the subsequent and inconsistent contract between the Company and the EEOC in order properly to serve the "Congressional policy favoring voluntary compliance with conciliation of employment discrimination charges" (Company Br. 38).

This argument fails at the threshold. Title VII's policy does not grant the EEOC the power to enter into agreements that nullify lawful collective agreements over the objection of a party to such an agreement. Congress in enacting Title VII chose not to confer upon the EEOC the power to issue cease and desist orders or any other power to compel private parties to act as the Agency directs. The conciliation agreement here may have been "voluntary" as between the Company and the EEOC. But that agreement was not "voluntary" with respect to the Union. The Company, to conciliate with the EEOC, may have willingly yielded up the Union's contract rights stated in the collective agreement's seniority clause. But those contract rights were not the Company's to yield, and the Union would not yield those rights. And nothing in Title VII required the Union to yield those contract rights to any official power other than to a lawful court order.

Moreover, because the contract rights that the Company and the EEOC would so blithely destroy derive from a collective agreement, the core premises of the national labor policy confirm that the position of the Company and the EEOC must be rejected. To further the national interest in industrial peace and stability, Congress made it a matter of paramount federal interest that collective agreements be enforced as written. Collective agreements must of course be consistent with federal substantive law, but a party that breaches its commitments made in such agreement, even in the good faith belief that the commitments are illegal, must bear the risk of liability on the contract if he is wrong.

ARGUMENT

I. THE BARRETT AWARD CANNOT BE SET ASIDE ON THE GROUND THAT ARBITRATOR BARRETT DID NOT FOLLOW THE SABELLA AWARD

A. The Company, in its statement of facts, summarizes the nature of this suit as follows: "The Company * * * commenced the present suit in the United States District Court for the Northern District of Mississippi to set aside Arbitrator Barrett's award * * *." Co. Br. 8. The standard of judicial review applicable to Arbitrator Barrett's award is stated in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596, 597, 599:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards. * * *
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. * * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective baragaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
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> * * * *
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> [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. * * * [T]he question of interpretation of the collective bargaining agreement is a question for the

> arbitrator. It is the arbitrator's construction which was bargaining for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

One would expect that given the nature of the Company's suit, its argument would consist of an intensive analysis of the Barrett award—the only award at issue—that demonstrates why that award is so defective that even under this restrictive standard of review the award must be set aside. But there is no such analysis. Indeed, in its statement of facts, the Company's sole reference to the substance of the Barrett award is the following:

> Although Mr. Barrett recognized that the grievances before him were the same as those decided by Arbitrator Sabella (J.A. 51), he refused to follow the Sabella award because, according to Mr. Barrett, Arbitrator Sabella had exceeded his jurisdiction and authority by basing his award upon equity (J.A. 54-56). And, contrary to Arbitrator Sabella, Mr. Barrett found that the Company was liable for having laid off employees in accordance with the conciliation agreement and the district court order rather than in accordance with the contractual seniority provisions (J.A. 56-57). [Co. Br. 8.]

And in its argument on the proper application of *Enterprise* to this case, the Company never discusses the substance of the Barrett award at all.

The Company's excuse for this startling omission is that it is a "given" that if the Sabella award was "valid" then the Barrett award must be "invalid." Its brief then undertakes (as does the EEOC's) to show that if the Union had sought to overturn the Sabella award in court —which the Union did not seek to do—the Sabella award would, under the *Enterprise* principle, have survived such judicial scrutiny. The conclusion tendered is that the demonstration that the Sabella award would not be

set aside in a judicial review action proves that the Barrett award must be set aside in such an action. But the Company's and EEOC's syllogism is flawed in its major premise: as we now show, *Enterprise* does not permit—much less require—the courts to scrutinize each challenged arbitration award to assure that the award is consistent with prior awards under the same contract—either in the general run of cases or in the particular situation presented by this case.

B. Arbitrator Barrett had before him for resolution three grievances alleging that the Company had violated the seniority provision of the collective agreement in its treatment of the grievants. It is not disputed that these were arbitrable grievances under the collective agreement.[22] Barrett resolved those grievances in an award that concluded that the Company had violated the agreement and thus owed the grievants backpay. The collective agreement provides, as such agreements ordinarily do, that an arbitrator's disposition of a grievance properly before him is "final and binding" upon the parties. In these circumstances, the only question presented here is whether the Barrett award is "confined to interpreta-

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[22] The agreement made arbitrable any "grievance" that "is not resolved" by the parties in the grievance procedure (JA 30-31). And a "grievance" is defined as follows:

> For the purpose of this Agreement, a grievance is defined as *a difference of opinion* between the Company and the Union, or between the Company and an employee covered by this Agreement, *with respect to the meaning and application of the terms of this Agreement.* [JA 30; emphasis added].

In each of the grievances before Arbitrator Barrett, the grievants alleged that "the Company [had] breached their rights under the seniority provisions of the collective bargaining agreement." [JA 48]. The grievances thus were arbitrable. *Steelworkers v. American Mfg. Co.*, 363 U.S. 563, 567-569; *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582-583; *John Wiley & Sons v. Livingston*, 376 U.S. 543, 553; *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 376-380 and n.10; *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 254-255.

tion and application of the collective bargaining agreement" and "draws its essence" from the agreement. The Barrett award meets those requirements and should be enforced.

In addressing the grievances before him, Arbitrator Barrett was governed by the collective agreement's definition of the "Arbitrator's Authority":

> The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation and application of the express provision or provisions of this Agreement at issue, between the Union and the Company. He shall have no authority to add to, adjust, change, or modify any provision of this Agreement. [JA 31]

Arbitrator Barrett's responsibility, therefore, was to decide whether, under the "express provision[s]" of the Agreement, the grievances should be sustained or denied.

At the threshhold, Arbitrator Barrett was confronted with the Company's argument that he should not independently interpret and apply those express provisions in deciding the grievances before him, but rather should accept the prior interpretation of those provisions in the Sabella award which had resolved a separate grievance of a different employee that had presented the same issue of contract construction. That threshhold question is one that arbitrators frequently confront: It is not uncommon that during the life of an agreement there will be separate grievances, filed by different employees, whose resolutions depend upon the same issue of contract construction. In those circumstances, the arbitrator must decide whether automatically to follow the prior award, or to apply his own analysis of the contract.

The prevailing wisdom in the arbitral jurisprudence is that one arbitrator is *not* bound by the construction of an agreement made in a prior award, even if the first arbitrator unquestionably acted within his "jurisdiction and authority" as stated in the agreement. While not

surprisingly arbitrators accord great weight to prior constructions, they ordinarily regard the "final and binding" language of the agreement to mean that a prior award *is* binding as to the grievance it resolved but does *not* bind the resolution of subsequent grievances. Thus, arbitrators regard themselves as free in disposing of the grievance before them to construe the same contract provision differently than the provision was construed in the prior award.[23] Because the issue whether to follow a prior award construing the agreement is one that the parties have committed to the arbitrator's resolution, and involves the construction and application of a provision of the agreement (the "final and binding" clause), the courts have understood that the arbitrator's resolution of that issue is subject to review only under the standard of *Enterprise, viz.* may be set aside only if the award does not "draw its essence" from the contract. *Westinghouse Elevators of Puerto Rico* v. *S.I.U. de. Puerto Rico, C.A.*, 583 F.2d 1184 (1st Cir. 1978); *Riverboat Casino, Inc. v. Local Joint Board of Las Vegas*, 578 F.2d 250 (9th Cir. 1978); *New Orleans Steamship Ass'n* v. *General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980), *affirmed* (*this issue not presented*) *sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, —— U.S. ——, 102 S.Ct. 2673 (1982); *Local 103 of Int. U. of Elec., R. & M. Wkrs. v. RCA Corp.*, 516 F.2d 1336 (3rd Cir. 1975);[24] *Machinists v.*

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[23] In addition to the authorities cited by the court below at JA 76, see generally, Elkouri & Elkouri, *How Arbitration Works* (3d Ed.) 376-377, 379-381 (BNA, 1973); Baer, *The Labor Arbitration Guide* 127-128 (1974); Remarks of Prof. Ben Aaron in *Problems in Opinion-Writing: A Panel Discussion*, in Proceedings of the 18th Annual Meeting of the National Academy of Arbitrators, 1, 8-9 (BNA, 1963); Meyers, *Procedural Problems in Ad Hoc Arbitration*, in Proceedings of the 20th Annual Meeting of the National Academy of Arbitrators 321, 326 (BNA, 1965).

[24] In *Local 103*, the collective bargaining agreement expressly provided that "[i]n no event . . . shall the same question [or issue] be the subject of arbitration more than once," 516 F.2d at 1338.

[Continued]

Associated Transport, Inc., 92 LRRM 2342 (M.D.N.C. 1976).[25]

We do not develop this general proposition at greater length because we do not understand the Company to

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The Third Circuit ruled that "[i]t is the function of the arbitrator, not the court, to decide whether the 'same question or issue' had been the subject of arbitration within the meaning of the collective bargaining agreement." *Id.* at 1339.

[25] The rationale underpinning the cited decisions is as follows. Once it is determined that the subject matter of a grievance is arbitrable under the agreement (here, the claim that the Company violated the seniority clause), questions that bear upon the correct resolution of the grievance are quintessentially for the arbitrator to decide. The question whether to follow a prior arbitrator's award requires a construction of the agreement's "final and binding" clause (what standard governing deference to prior awards have the parties imposed?) and an application of that construction to the particular circumstances before the arbitrator (is that standard satisfied in this case?) The parties have committed the resolution of these questions—questions "with respect to the meaning and application of the terms of this Agreement" (JA 30) —to the arbitrator. As in the case of "procedural" questions that this Court has held are for the arbitrator to decide, *Wiley v. Livingston, supra*, 376 U.S. at 555-559, so, too, questions as to the weight to be accorded a prior arbitral construction of the agreement are for the arbitrator. As in *Wiley*, questions of the latter type "do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it" (*id.* at 556-557); they "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration" (*id.* at 557); and the national labor policy favoring judicial abstention from reviewing the "final" resolution of arbitrable disputes—not to mention the interest in avoiding an opening of the judicial floodgates—would be undermined by "the fractioning of disputes about subjects which the parties wish to have submitted" to arbitration (*id.* at 557-559).

A corollary is that the courts have recognized that they cannot "enforce" an arbitration award by judicially ordering obedience to its construction with respect to similar situations arising in the future, but rather must remit claims relating to such situations to resolution through the grievance-arbitration procedure of the agreement. *Oil Chemical & Atomic Workers v. Rohm & Haas*, 677 F.2d 492 (5th Cir. 1983); *Local 108, supra* n.24.

contend otherwise. The Company refrains from any contention that § 301 *as a matter of law* requires that one arbitrator adhere to the construction of an agreement made by a prior arbitrator. Co. Br. 8 n.7. Thus, if Barrett had declared that the contract left him free to ignore prior arbitral constructions of the agreement that he concluded were erroneously reasoned, and that he was ignoring the Sabella award on that ground, there is nothing in the Company's brief that suggests, let alone would justify, invalidating the Barrett award.

But Arbitrator Barrett travelled a somewhat different path, and the Company seeks to exploit that difference to inject the judiciary into second-guessing the correctness of his disposition of this question. Barrett construed the collective bargaining agreement here to impose a higher than normal standard that must be met before one arbitrator is permitted to enter an award contrary to a prior award's construction of the collective agreement. In contrast to conventional arbitral jurisprudence, Barrett construed the "final and binding" clause of this agreement to mean that a prior arbitrator's construction of the agreement could not be ignored simply on the second arbitrator's conclusion that the earlier construction was wrong, but only if the second arbitrator concluded that the first award was not "issued within the authority of the Arbitrator" or did not "flow from the jurisdiction conferred upon him by the contract" (JA 53-54). Having erected this higher standard for refusing to follow a prior award, Barrett applied it to the circumstances before him and concluded that judged by that standard the Sabella award's construction of the agreement was not binding.

The Company proceeds as if the standard adopted by Arbitrator Barrett is the same as that applied by courts in a suit to enforce or set aside an arbitrator's award. But Barrett nowhere *said* that the standard he applied is the same as that followed by the courts in such a suit, and a close examination makes clear that his standard is *not* that judicial standard.

The Sabella award is a classic "ambiguous" award; it is impossible to tell from the face of the award whether the award is a construction of the contract or rests on the arbitrator's personal values. Sabella was asked to decide a grievance alleging that the Company had violated the agreement. The Sabella award recognizes that the alleged violation had occurred, but declares—without reference to any provision of the agreement—that it would be "inequitable and manifestly unfair" to "penalize" the employer by awarding backpay for that violation. The Company argues that there is a provision of the agreement (the "illegality" or "savings" clause) that might have furnished a contractual underpinning for that disposition, and we assume *arguendo* that a rational person *could have* predicated the Sabella award's result on a construction of that provision, *viz* that Arbitrator Sabella's declaration that it was "inequitable and manifestly unfair" *may* have been an inartful way of expressing his *true* holding that the "savings clause" in the agreement properly construed permitted the denial of backpay. But it is also possible that the Sabella award is *not* predicated on that provision (which is nowhere cited in his award) but instead meant exactly what it said, in which event Sabella was "dispens[ing] his own brand of industrial justice," *Enterprise*, 363 U.S. at 597.

No one can be sure *which* of these two possible bases for the award is the true basis. As in *Enterprise*:

> It might be read as based solely upon the arbitrator's view of [matters extraneous to the contract], which would mean that he exceeded the scope of his submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to [extraneous matters] for help in determining the sense of the agreement. [363 U.S. at 597].

And *Enterprise* states the rule that the courts are to apply when the losing party seeks to set aside an award that is "ambiguous" in this way. "*A mere ambiguity in*

the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce his award." 363 U.S. at 597-598; emphasis added. As the Third Circuit put it, in one of the cases relied upon by the Company, the courts must enforce such an award if "it is *possible* that the arbitrator *could have been* interpreting the contract." *Arco-Polmers, Inc. v. Local 8-74*, 671 F.2d 752, 757 (3rd Cir. 1982; emphasis added). See also *id.* at 756, n. 3.

If the Union had sued to set aside the Sabella award, and thus to resuscitate "[t]he grievance of Albert L. Jowers" denied in the Sabella award, the courts would have applied these principles in ruling on the Union's suit. If the award *were* upheld, it would not have been because the courts had determined that Arbitrator Sabella *had* stayed within his jurisdiction and authority, but because *it was not clear that he had not.*

Arbitrator Barrett, in contrast, was not asked to reopen Arbitrator Sabella's decision that "[t]he grievance of Albert L. Jowers . . . is denied." Arbitrator Barrett was asked, rather, to decide the grievances of *other* employees, and to do so by reference "exclusively" to the "express provisions" of the agreement. In deciding whether to defer to the Sabella award, the controlling contractual standard as stated by Barrett was not whether the Sabella award "could possibly have" been based upon the contract, but rather whether in Barrett's best judgment the Sabella award *was* based upon the contract—indeed, given the particular language in the "Arbitrator's Authority" provision of this agreement, whether the Sabella award was in Barrett's best judgment based upon an "express provision" of the contract. And it was this standard—a standard quite different from that applied by the courts under *Enterprise*—that Barrett found the Sabella award could not meet. Although Arbitrator Sabella, like Arbitrator Barrett, had been "enjoined by the contract, to 'confine' himself 'exclusively' to the interpre-

tation and application of [the] express provision[s] of the contract" (JA 55),

> [t]he ruling of [Sabella] that it would have been inequitable and manifestly unfair to penalize the Employer, is wholly unsupported by any express provision of the contract, and there is no contention to the contrary either by [Sabella] in # 78-7 or by the Company throughout this proceeding * * * There is consequently no interpretation or application in # 78-7 to be followed in this proceeding, and this Arbitrator to be consistent with his contractual authority and jurisdiction must necessarily ignore # 78-7 and instead resort to the applicable express provisions of the contract. [JA 55-56].

In short, the standard erected by Arbitrator Barrett was this: Under this contract, an arbitrator should defer only to a prior arbitrator's articulated interpretation of an "express provision" of the agreement. That standard did not dictate adherence here, because Arbitrator Sabella had nowhere articulated an interpretation of such a provision.

Arbitrator Barrett thus construed the "final and binding" clause to establish a criterion governing adherence to prior awards *in subsequent cases* that is different from the criterion applied by courts when called upon to review the initial award itself. That difference is not surprising: the two situations involve different tribunals deciding different questions that implicate different aspects of national labor policy. Because Congress has declared arbitration to be the preferred method for resolving grievance disputes, § 203(d) of the LMRA, and because the parties here have agreed that arbitration awards are "final and binding", for a court to overturn such an award is an intrusion on both national labor policy and the parties' express desires. Thus such judicial action is reserved only for those cases in which it is absolutely clear that the arbitrator has overstepped his authority. *Enterprise.*

The calculus is entirely different when an arbitrator is asked to defer to a prior arbitral award. Then, the request is addressed to a second decision maker on a par with the first: The second arbitrator no less than the first is a person in whom the parties chose to place their trust. Moreover, the issue posed is not whether a prior dispute is to be reopened, but only whether the resolution of that dispute is to be followed in deciding a separate but similar dispute. Finally, adherence to a prior award deprives the parties of the independent interpretation for which they contracted and should be indulged only when it is absolutely clear that the prior arbitrator did *not* overstep his authority. In sum, because the interests are different in the two situations, it is not surprising that the criteria for resolution should differ between the two.

C. Even if Arbitrator Barrett had construed the "final and binding" clause of the agreement to erect the same standard as *Enterprise*, i.e., to instruct a second arbitrator to follow a prior award if it "could possibly have" been based upon a construction of the agreement, it still would not follow that the second arbirator's application of that standard would be subject to judicial review for conformity to *Enterprise*. As we have just explained, the parties are free to contract for whatever rule they choose respecting the weight a subsequent arbitrator is required to give a prior arbitrator's construction of the agreement, and an arbitrator faithful to his commission is obliged to apply that standard as best he can.

If a particular employer and union opt for the standard of *Enterprise*, those parties have opted for a *contractual* standard, to be interpreted and applied by *arbitrators* in deciding the weight to be accorded prior awards, that coincides with the *statutory* standard that is applied by *courts* in deciding whether awards are entitled to judicial enforcement. It does not follow, however, that an arbitrator's interpretation and application of that standard in the context before *him* (*viz.* in deciding whether a prior arbitrator's construction controls the resolution

of subsequent grievances) is subject to judicial review as to the correctness of the standard's application. Certainly, if the parties had chosen a *different* standard than *Enterprise*, the arbitrator's application of that standard would not be reviewable on the merits (see pp. 23-24 and n.25 *supra*), and the scope of review is not enlarged because the parties choose as their contractual standard one that approximates a standard applied by the judiciary in other contexts. Whatever standard the parties adopt for determining the weight to be accorded prior awards, they have commissioned the arbitrator to interpret and apply that standard. That the parties may have chosen a standard that happens to parallel a standard applied judicially in other contexts does not alter the fact that *in this context* it is a standard to be administered by arbitrators, not courts. And so long as the parties have declared (as here) that the arbitrator's ruling is to be "final and binding", his application of that standard is not reviewable on the merits. *Enterprise*.[26]

This point has its most frequent application in the context of collective agreements that forbid discrimination on the basis of race, sex, etc. Not surprisingly, arbitrators often conclude that the parties intended the term "discrimination" to have the same meaning under the contract as it is accorded by the courts in administering Title VII. From that starting point, arbitrators often look to judicial decisions construing Title VII for guidance. An arbitral ruling thus premised is faithful to the arbitrator's commission, for it "embod-[ies] a construction of the agreement itself, * * * with the arbitrator looking to 'the law' for help in determining the sense of the agreement," *Enterprise*, 363 U.S. at 598.

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[26] Of course, an arbitrator's award can not be "final and binding" when the contractual provision construed is unlawful, or when the remedial action directed by the arbitrator is unlawful. Cf. *Kaiser Steel Corp.* v. *Mullins*, —— U.S. ——, 50 LW 4152. But neither of these counts pertains here; to the extent that the Company suggests otherwise, we show in Part II herein that its suggestion is wrong.

But it hardly follows that, because the arbitrator construed the agreement to establish *contractually* a standard identical to that in Title VII, the merits of the arbitrator's award would be reviewable for conformity to Title VII. Indeed, this Court has clearly understood that such an award would *not* be reviewable for conformity to Title VII, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54-60, and in part because of that understanding has held that an adverse arbitral decision does not preclude an employee's prosecution of an independent Title VII action alleging discrimination, *ibid.*[27]

II. THE ERRONEOUS DISTRICT COURT ORDER DOES NOT EXCUSE THE COMPANY FROM ITS CONTRACT LIABILITY

The Company and the EEOC argue that the Barrett award should not be enforced because the award would "punish[] the Company for complying with an enforceable court order" (EEOC Br. 21)—or, in the Company's words, for doing "exactly what . . . a federal district court had ordered it to do" (Co. Br. 30). Through this argument, the Company seeks to escape its contractual liability to its employees for breaching the collective agreement. The impediment to meeting the requirements of the collective agreement is a court order: that the Company itself sought; that flowed from a conciliation agreement the Company made an independent judgment to sign even though that agreement conflicted with the collective agreement already in effect; that embodies an

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[27] In concluding this portion of our brief, we are constrained to note that even if the Company's argument that Arbitrator Barrett was bound by the Sabella award were sustained, that would not justify the action of the district court invalidating the Barrett award *in its entirety*. Two of the grievances resolved in the Barrett award challenged layoffs that occurred *prior to the district court's order*. Plainly the legitimacy of those layoffs was not resolved by the Sabella award, whose sole holding was that it "would be inequitable and manifestly unfair to penalize the Employer" for "acting in concurrence with the District Court's order, as it was required to do" (JA 47).

ostensible "remedy" for the Company's own alleged wrongdoing in engaging in hiring discrimination—alleged wrongdoing in which neither the Union nor the senior employees adversely affected participated; and that was set aside as erroneous by the court of appeals.

The Company and the EEOC make it appear that the issue respecting the effect of the erroneous district court order on the Company's contract liabilities to the Union and to the affected employees is not a question of contract law but a question to be resolved by law derived from some source independent of the contract. Both cite cases to establish the proposition that courts, and perforce arbitrators, lack the power to provide relief to individuals on the sole ground that those individuals had been injured by a court order that later proved erroneous. Co. Br. 34-37; EEOC Br. 21-22. We do not take issue with those cases. It is common ground that neither a public nor a private tribunal has authority, in the absense of a bond, to direct relief on that basis. But that unexceptionable proposition is not relevant here and hence does not settle this case.

The issue before Arbitrator Barrett was not whether the innocent grievants have a remedy for such injuries as they might show resulted from the erroneous court order, but whether the Company made a *contractual* promies to make those employees whole for their injuries resulting from the Company's contract breach in the circumstances of this case. Barrett concluded that the Company had done so. Barrett found the Company's breach to be the signing of the "EEOC Conciliation Agreement which in part abrogated [the Company's] agreement with the Union" (JA 56)—a breach that occurred before any district court order was entered. And Barrett held that the Company was responsible for—"assume[d] the risks of"—the "consequences" of that breach. (*Ibid.*).

The Barrett award could conflict with a principle of *law*, therefore, only if the law forbids parties from contracting that in the event of a court order secured in

circumstances such as those here one party will be liable to make theother party whole for contract breaches. And the clearest proof that the law imposes no such impediment is that under traditional common law principles contractual liability is understood to be the norm in these circumstances.

In discussing the question "[w]hether a judicial, executive or administrative order restraining or preventing performance of a contract is an impossibility caused by law in such a sense as to excuse a promisor," Williston describes the general principles that would be applicable here (6 Williston, Contracts § 1939 (3rd Ed. 1962, Supp. 1974) pp. 46, 48-50, footnote omitted):

> No doubt if the legal proceedings interfering with performance of the promise are in any way due to the fault of the promisor, as an attachment or receivership to collect a debt or debts rightfully due by him, the interference should constitute no defense, not because it is not the act of the law, but because the impossibility is primarily due to the promisor's own fault, not to fortuitous circumstances beyond his control.
>
> Where, however, the proceedings which interfere with the performance of the promise are based on no fault of the promisor, there seems no reason why the interference should not be an excuse, unless the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of it assumed by the obligor.
>
> The true test according to one case is not whether the intervening act or order was governmental or individual but is whether or not the promised performance was made impossible by a judicial proceeding which the promisor-defendant was powerless to prevent or control.
>
> If so, he will be discharged, provided the judicial decree or proceeding was not generated by defendant's own act or fault and the defendant in good

> faith has attempted to dissolve the injunction or secure the dismissal of the intervening proceeding.

See, e.g., *Lowenschuss v. Kane*, 520 F.2d 255, 265-67 (2d Cir. 1975) ("Impossibility caused by a judicial order prohibiting performance will excuse a party's performance only if the fault of the party owing performance did not contribute to the order.").[28]

Of course, in this instance the question of contract law Williston identifies and which turns on contract interpretation is not a matter for the courts. The parties to the collective agreement here have committed exclusively to the arbitrator the task of resolving disputes under that agreement. And, Arbitrator Barrett's award rejected the argument that the erroneous court order excused the Company from liability for its breach.

Under *Enterprise*, Arbitrator Barrett's decision on this issue of contract interpretation must be upheld unless that decision cannot be found to have drawn "its essence from the collective bargaining agreement." 363 U.S. at 597. The Barrett award more than meets *Enterprise's* test. Even putting aside the general principles of contract interpretation discussed above, the most reasonable construction of the express savings clause of the agreement —the clause relied on by the Company—supports Barrett's decision to hold the Company liable for its breach of the seniority provisions. The contractual savings clause provides that federal law shall supersede any provision of the contract that "is found to be in conflict with any . . . Federal Law []". It is not a necessary—indeed it is not even a likely—construction of that clause that the parties intended a provision of the contract to be superseded by an erroneous federal district court order that is reversed on appeal. The ultimate judgment of the judicial system, embodied in the Fifth Circuit's reversal of the district court's order, is that the contract's senior-

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[28] See also, Restatement of Contracts (Second) § 264 (1981) at p. 332 (Illustrations four and five); 6 Corbin, Contracts § 1346 (2nd Ed 1962) at 430.

ity provisions are lawful. The court of appeals having upheld those provisions, the savings clause did not require the arbitrator to find that the provisions were superseded by the erroneous contrary ruling of the district court reversed on appeal.

Further, particularly in light of the general common law principles of contract interpretation already discussed, it is reasonable to construe the savings clause as not eliminating monetary liability for breach in a situation where a court ruling against the validity of a provision of the contract results from the wrongdoing of the party seeking to escape its liability under that provision. Here the Company having made a contract with the Union, knowingly entered into a conciliation agreement with the EEOC in derogation of that contract—and knowingly took action, laying-off numerous senior employees, in breach of its contract with the Union. As we show in the margin, it was the conciliation agreement and not the collective agreement that was in conflict with the prevailing law at the time the conciliation agreement was entered.[29] But even if that were not so, the conciliation

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[29] The Company and the EEOC contend that entering into the Conciliation Agreement was responsive to the decisional law of the time, and turned out to be improper only because of this Court's later decision in *Teamsters v. United States*, 431 U.S. 324. That contention is wrong.

The Company and EEOC pretend that the seniority provision of the collective agreement contained the feature that the lower courts were invalidating in the line of cases later overruled by *Teamsters*, and that the seniority "override" in the conciliation agreement resembled the remedies that the lower courts were awarding in those pre-*Teamsters* decisions. To the contrary, the seniority provision of the collective agreement was precisely the type that the lower courts were *mandating* in the pre-*Teamsters* era, and the seniority "override" in the conciliation agreement was *unlawful* under a controlling decision of the Fifth Circuit—the Circuit in which the Company's plant is located—that was on the books at the time the conciliation agreement was negotiated.

The lower court decisions that this Court overruled in *Teamsters* had invalidated *departmental* seniority systems on the ground that they perpetuated prior discrimination in the assignment of em-

ployees as between departments. The remedy that the lower courts had prescribed in those cases was a conversion to plant seniority—the very system that was already contained in the collective agreement here.

The seniority "override" in the conciliation agreement—which gave all women seniority preferences whether they were identifiable victims of discrimination or not—was in the teeth of the Fifth Circuit's holding in *Local 189, United Paperworkers v. United States*, 416 F.2d 980, 995 (5th Cir. 1869), *cert. denied*, 397 U.S. 919 (1970), that conferring "fictional seniority" upon blacks who were not "the actual victims of previous discrimination" would "comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race." That principle was reaffirmed by the Fifth Circuit after the conciliation agreement herein was signed but before the court order was obtained, in *Watkins v. United Steelworkers*, 516 F.2d 41, 46 (5th Cir. 175) (conferring special seniority rights upon "blacks not otherwise personally discriminated against" is "preferential treatment" prohibited by Title VII).

At no time did the Company or the EEOC introduce evidence that even one (let alone all) of the women who enjoyed a seniority preference by virtue of the conciliation agreement was an "actual victim of previous discrimination." (Indeed, it was not even admitted by the Company that there had been any prior discrimination.) Moreover, the design of their conciliation agreement was indifferent to whether the women granted preferences were victims of prior discrimination: that agreement conferred preferences indiscriminately upon *all* women, including those whose ages were such that they would have been too young to be in the job market at the time of the Company's *alleged* discrimination (*supra*, p. 7) and upon those who would be hired in the future and whose identity thus was unknown. Conversely, the agreement made no effort to assure that those who *were* the victims of the Company's alleged hiring discrimination would be hired and thus afforded the benefits of the conciliation agreement.

Of course, by the time the Fifth Circuit overturned the conciliation agreement in *Southbridge*, this Court had decided *Teamsters*, and not surprisingly the Fifth Circuit invoked *Teamsters* as establishing *a fortiorari* the impropriety of the conciliation agreement. But the opinion in *Southbridge* also cited the pre-*Teamsters* law in the Fifth Circuit that had invalidated (as contrary to national labor policy) seniority "overrides" that subordinated collectively bargained seniority rights to preferences benefiting non-victims of prior discrimination.

agreement could have been justified only on the basis that the Company, not the Union, had previously discriminated against women in hiring new employees. Thus, the Company's construction of the savings clause would entitle the Company to negate its contractual seniority promises *without thereby incurring any liability*, because of a court order *sought by the Company* deriving from one or both of the following acts of wrongdoing on the Company's part: (1) the entry into two inconsistent contracts, which entailed the knowing and willful breach of the Union's contract; (2) discrimination against women in the hiring process. In these circumstances, it is not surprising that Arbitrator Barrett found that the contract did not excuse the Company from liability for its contract breach.

III. EEOC CONCILIATION AGREEMENTS DO NOT SUPERSEDE COLLECTIVE AGREEMENTS

In this Court, the Company advances a third argument: an argument not advanced below. The Company, joined by the EEOC, argues that the Union's contract with the Company, and thus the Barrett award based on that contract, must as a matter of law give way to the subsequent and inconsistent contract between the Company and the EEOC in order properly to serve the "Congressional policy favoring voluntary compliance with conciliation of employment discrimination claims" (Co. Br. 38). See Co. Br. 38-45; EEOC Br. 14-20. In the words of the EEOC (EEOC Br. 19):

> Our submission is that since Congress has chosen conciliation rather than litigation as the preferred means of resolving Title VII disputes, conciliation agreements, if reasonable, should be given the same effect as Title VII's actual requirements for purposes of enforcing an arbitral award. If the award is inconsistent with the conciliation agreement, then it is unenforceable.

This argument fails at the threshold. Title VII's policy does not grant the EEOC the power to enter into a con-

ciliation agreement that nullifies a collective agreement over the objection of a party to the latter.[30] Congress in enacting Title VII chose not to confer upon the EEOC the power to issue cease and desist orders or any other power to compel private parties to act as the Agency directs. The EEOC could not command the Company to modify its layoff and promotion practices, nor could the Agency command the Union to give up its contractual seniority rights to accommodate the Company's modification of those practices.

Rather, as both the Company and the EEOC stress, the EEOC's role, as fashioned by Congress, is to conciliate employment discrimination charges. What is determinative here and what the Company and the EEOC do not stress, is that failing such a voluntary conciliation the Agency's only recourse is to initiate, or to authorize the charging party to initiate, an action in a court of law. Congress conferred the exclusive power to order compliance with Title VII's norms on the courts. And Congress in 706(g) of Title VII limited the judiciary's authority in this regard to the provision of a remedy "*if the court finds*" a violation of the statute.[31]

There is not a single indication in Title VII's words or in its legislative history that the EEOC may evade these limitations on its own authority and on the courts' authority by entering into a "reasonable" conciliation agreement containing a non-admissions clause with a

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[30] The point we develop in text is applicable whether or not the conciliation agreement is "reasonable." It is a further handicap to the Company and the EEOC in *this* case that the particular conciliation agreement they negotiated is *unlawful*. See p. 35, n.29, *supra*.

[31] "Title VII does not provide the [EEOC] with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions". *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44. If conciliation efforts fail, a lawsuit may be instituted in federal district court, either by the EEOC or the charging party; "final responsibility for enforcement of Title VII is vested with federal courts." *Alexander, supra*, 415 U.S. at 44.

company and by that device denying a union and the employees the union represents rights stated in a collective agreement and never found by a court to be inconsistent with rights stated in Title VII.

In short, the conciliation agreement here may have been "voluntary" as between the Company and the EEOC. But that agreement was not "voluntary" with respect to the Union. The Company, to conciliate with the EEOC, may have willingly yielded up the Union's contract rights stated in the collective agreement's seniority clause. But those contract rights were not the Company's to yield, and the Union would not yield those rights. And nothing in Title VII requires the Union to yield those contract rights to any official power other than to a lawful court order.

Moreover, because the contract rights that the Company and the EEOC would so blithely destroy derive from a collective agreement, the core premises of the national labor policy confirm that the position of the Company and the EEOC must be rejected. The pertinent aspects of the national labor policy emerge from the following brief review of this Court's decisions.

First, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to provide industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104. The "fundamental premise" of that process, as Congress and this Court have made clear, is "private bargaining under governmental supervision of the procedures, without any official compulsion over the actual terms of the contract." *Porter Co. v. NLRB*, 397 U.S. 99, 108. "And to make crystal clear the intention to leave the parties entirely free of any agreement, Congress added § 8(d) [to the NLRA] defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession." *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219.

Second, having established a system of labor relations built on the concept of free collective bargaining, Congress determined that:

> Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 17.]

Thus, in § 301 of the LMRA, Congress established that neither party to a collective agreement may repudiate the commitments made therein and that enforcement of the private bargain as reached is a matter of paramount federal interest. As this Court stated in *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

"The present federal policy is to promote industrial stabilization through the collective bargaining agreement." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578.

From the principles just reviewed,

> [i]t follows that the parties' agreement primarily determines their relationship. * * * If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution. [*Carbon Fuel*, 444 U.S. at 219. See also *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 254-256.]

In this regard the national labor policy strictly limits the power of government agencies and the courts. No court

or agency has authority to make collective agreements for the parties, or to substitute other agreements governing terms and conditions of employment for the collective agreement, or to remake the collective agreement the parties have made.

The system of free collective bargaining just described is, to be sure, limited by the body of federal statutes that directly prescribe certain substantive rules governing employers, employees, and unions. As the Court in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 70, put it, "[w]hen union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law. * * *." "[N]either a collective bargaining contract nor a seniority system may be employed to violate [Title VII] * * *." *Trans World Airlines v. Hardison*, 432 U.S. 63, 79. But Title VII does not subordinate collective agreements to conciliation agreements.[32] In *Hardison*, this Court stated (*id.*):

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree * * * that an agreed-upon seniority system must give way * * *.

And, as we have already noted, there is not a single word in the legislative history much less a clear and express indication manifesting a Congressional intent to subordinate collective agreements to conciliation agreements. Indeed, a major theme stated in those legislative delibera-

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[32] Of course, an employer who believes that a provision of his collective agreement is in some way inconsistent with the requirements of Title VII has the option—with or without the collaboration of the EEOC—of not honoring that provision. An unlawful contract provision is not enforceable, and the employer response to a union § 301 action for breach of the agreement would be the defense of illegality. The union would prevail only if the agreement were found not to be inconsistent with Title VII.

tions is Congress' intent to *minimize* the intrusion Title VII would work on free collective bargaining. As this Court pointed out in *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (footnote omitted):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99.

In short, in enacting Title VII Congress did not go to the extreme of abandoning the core concepts of the national labor policy in order to allow the Company and the EEOC to agree in a conciliation agreement to override a collective agreement despite the signatory union's objection.

CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX OF RELEVANT STATUTORY PROVISIONS

Section 203(d) of the Labor Management Relations Act of 1947 (29 U.S.C. § 173(d)) provides as follows

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the applicaiton or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grivance disputes only as a last resort and in exceptional cases.

Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) provides in pertinent part as follows:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 706 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-5) provides in pertinent part as follows:

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c)

or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * * *

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member

of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. * * *

* * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earn-

able with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

Petitioner's Reply Brief

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No. 81-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. R. GRACE AND COMPANY,
Petitioner,
v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 34.4 of this Court's rules, the Petitioner, W. R. Grace and Company ("Grace" or "the Company"), submits this Reply Brief in response to the brief of the Respondent, Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America ("Local 759" or "the Union").

A. The Union's Arguments And Concessions Regarding The Validity Of The Sabella Arbitration Award Compel The Reversal Of The Fifth Circuit's Judgment

Local 759's brief to this Court makes clear that this case is ripe for summary or *per curiam* reversal based on the first two questions presented for review. For, as we show below, the Union now concedes that the Company's arguments regarding those two questions are

legally correct, and its additional arguments were never raised in the Fifth Circuit and are contrary to the facts in this case.

In its earlier brief (Co. Br. at 16-20), the Company argued that the Fifth Circuit erred in concluding that its 1978 decision foreclosed Arbitrator Sabella from determining that the Company had not breached its union contract. The Union has now "freely admit[ted] that the Fifth Circuit's rationale . . . cannot withstand analysis" and "that the Company's analysis on this point is . . . correct" (U. Br. at 16). Accordingly, one possible basis for affirming the Fifth Circuit's judgment is gone.[1]

The Company also argued to this Court (Co. Br. at 20-29) that the Fifth Circuit's alternative ground for

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[1] Although obviously correct, the Union's concession that the Sabella award cannot be invalidated on this ground is somewhat surprising inasmuch as that is precisely the ground upon which the Union urged the Fifth Circuit to hold the Sabella award invalid. Thus, in its brief to the Fifth Circuit (Brief of Appellant, Case No. 80-3661, pp. 15-16 (hereinafter "Appellant's Brief")) the Union argued that the Sabella award must be held invalid because Arbitrator Sabella had ignored the appellate court's 1978 holding that

> *as a matter of law*, . . . the [Company] *breached* the collective bargaining agreement by following the terms of the conciliation agreement. . . . By refusing to follow the specific conclusion reached by this Court [*i.e.*, the Fifth Circuit] that the [Company] had, in fact, breached the collective bargaining agreement, Arbitrator Sabella entered an order which . . . exceeded his jurisdictional authority under the collective bargaining agreement . . . . [Emphasis in original.]

Further, in its reply brief to the Fifth Circuit (Reply Brief of Appellant, Case No. 80-3661, p. 4 (hereinafter "Appellant's Reply Brief")) the Union characterized as "incredulous" (sic) the Company's argument which it has now adopted. And finally, even in its response to the Petition for Certiorari in this case, the Union continued to urge that the Fifth Circuit's 1978 decision foreclosed Arbitrator Sabella from finding that Grace had not breached its union contract. See Brief In Opposition to Petition for Writ of Certiorari at 13-15 (hereinafter "Opp. Cert.").

invalidating the Sabella award could not be upheld—*i.e.*, its determination that the Sabella award did not draw its essence from the contract. This argument, too, the Union now concedes to be correct. Thus, at page 26 of its brief, Local 759 acknowledges that

> [t]he Sabella award is a classic "ambiguous" award; it is impossible to tell from the face of the award whether the award is a construction of the contract or rests on the arbitrator's personal values.

And the Union goes on to admit that this Court's decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), mandates the enforcement of such awards (U. Br. at 26-27, emphasis in Union's brief):

> And *Enterprise* states the rule that the courts are to apply when the losing party [in arbitration] seeks to set aside an award that is "ambiguous" in this way. "*A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce his award.*" 363 U.S. at 597-598

Accordingly, having admitted that application of this Court's *Enterprise Wheel* test bars invalidating the Sabella award, the other possible basis for affirming the Fifth Circuit's judgment is gone.[2]

The Union suggests, however, that the foregoing concessions are of no moment because enforcement of the Barrett award does not turn on whether the prior Sabella award would or would not have survived judicial challenge (U. Br. at 16-17, 19-21). Rather, according to the Union, the Barrett award must be judged independently

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[2] Like its present position regarding the effect of the Fifth Circuit's 1978 decision, the Union's concession here represents a complete reversal of its earlier position. Local 759 previously argued to the Fifth Circuit (Appellant's Brief at 12-18; Appellant's Reply Brief at 1-4) that the Sabella award was unenforceable because it failed to draw its essence from the contract. And it urged this Court (Opp. Cert. at 15-18) to deny certiorari on the ground that the appellate court correctly decided this issue.

and be enforced if it draws its essence from the collective bargaining agreement (U. Br. at 21).[3]

The problem with this contention is that it flies in the face of the facts of this case and the grounds upon which the case has been litigated up through and including the Petition for Certiorari and the Union's response thereto. Indeed, the Union itself admits (U. Br. at 14) that it never made this contention in the lower courts. That is an understatement. It has been clear throughout this case that the parties understood their labor agreement to require that the Barrett award be set aside if the Sabella award was court enforceable. And, consistent with that understanding, from the inception of this litigation the Union has sought enforcement of the Barrett award by attacking, in court, the validity of the Sabella award.

Thus, in the district court Local 759 argued that the Sabella award did not warrant setting aside the Barrett award because the former award involved different issues (*i.e.*, demotions rather than layoffs) and because Arbitrator Sabella had allegedly exceeded his contractual authority by ignoring the Fifth Circuit's 1978 ruling and by not basing his award upon the provisions of the contract. In the Fifth Circuit the Union abandoned the first argument (demotions versus layoffs), but continued to attack the Sabella award on the other two grounds (see nn. 1 and 2, *supra*). And in its reply brief to the Fifth Circuit the Union did not question the Company's state-

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[3] All of the Union's substantive arguments for enforcing the Barrett award flow from these two related premises. Thus, the Union argues (U. Br. 21-31), in essence, that the courts must defer to Arbitrator Barrett's determination of the validity of the Sabella award and that it matters not whether Arbitrator Barrett incorrectly applied the judicial standards for reviewing arbitral awards (see U. Br. at 29-31) or applied some higher standard for determining validity (see U. Br. at 25-29). As is clear from the text following this footnote, however, not only were these arguments never made to the courts below, they are inconsistent with the position the Union has heretofore taken.

ment that the parties agreed that their contract's finality clause required setting aside the Barrett award if the Sabella award was enforceable.[4] On the contrary, the first sentence of that reply brief makes clear just what issue the Union deemed to be determinative of the enforceability of the Barrett award (Appellant's Reply Brief at 1):

> Because of this Court's rule that a party's briefs may not exceed a total of 50 pages, Appellant will limits [sic] its arguments in its Reply Brief to the issue of the validity of Arbitrator Sabella's award.

Nowhere in these briefs was there an argument, or even a suggestion, that the court was not to determine independently, by application of the usual judicial standards, the validity of the Sabella award.[5] To the contrary,

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[4] The following passages are quoted from the Company's Fifth Circuit brief (Brief for Appellee, Case No. 80-3661, pp. 13, 16-17):

> The Company, Union and Arbitrator Barrett agree that if Arbitrator Sabella acted within his contractual authority in rendering his earlier award, then Mr. Barrett's award would be jurisdictionally defective because he had no authority to re-arbitrate the same issue decided by Arbitrator Sabella.
>
> . . . .
>
> . . . The Company and the Union agree that [the finality clause of their contract] forecloses rearbitration of issues which have previously been properly resolved by the arbitral process. And, more specifically, the parties in this lawsuit and Mr. Barrett himself agree that, under this provision, the decision of Arbitrator Sabella would preclude redetermination by Mr. Barrett if Mr. Sabella in fact acted within his contractual authority in rendering the first award.[4]

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[4] The Union has not contended before Arbitrator Barrett, before the District Court, or in this Court, that Mr. Barrett had the authority to issue a contrary award on identical issues irrespective of the validity of the Sabella award. It is also clear that Arbitrator Barrett did not consider himself so empowered. . . .

[5] Indeed, aside from the Company's contentions regarding the effect of the conciliation agreement and district court order on the

that was precisely the issue presented, and decided, as the Fifth Circuit's opinion makes clear.[6]

Moreover, until its present brief, Local 759 had previously taken the position before this Court that the enforceability of the Barrett award turned on whether or not the Sabella award was enforceable. Thus, the Union's Brief in Opposition to the Petition for Certiorari did not contest the Company's statement (Petition for Certiorari at 5 n. 5, 6, n. 7) that their contract required setting aside the Barrett award if the Sabella award was valid. Nor did it question the *propriety* of the Fifth Circuit or any other court determining whether the Sabella award was valid. On the contrary, the Union urged this Court (Opp. Cert. at (i) and at 13-18) that the Fifth Circuit *was correct* in determining that the Sabella award was invalid for precisely the reasons that it now admits will not support the appellate court's judgment.

In these circumstances, it matters not whether Local 759's former counsel specifically confirmed at oral argu-

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enforceability of the Barrett award, the only argument made to the courts below regarding the Barrett award itself was the Company's contention that Mr. Barrett's discussion of the validity of the Sabella award was *ultra vires* and thus did not operate to preserve that issue for judicial determination (see Co. Br. at 15 n. 14). The gist of the Company's argument was that once the statute of limitations for judicially challenging the Sabella award expired, it could not be resurrected by Arbitrator Barrett's inappropriate decision on the subject. Both the district court and the Fifth Circuit rejected the Company's argument in this regard (see J.A. 86) and proceeded to determine the validity of the Sabella award.

[6] The Fifth Circuit's opinion states that the question of whether the Barrett award should be set aside "turns in large measure on whether the earlier Sabella award which yielded a contrary result was itself valid" (J.A. 75). Elsewhere the appellate court states that "the core inquiry in this case, *as both parties recognize*, is whether the Sabella award can stand or was outside his jurisdiction and authority" (J.A. 78; emphasis added). And, of course, the appellate court did, in fact, determine the validity of the Sabella award by application (albeit misapplication) of the usual judicial standards for reviewing arbitration awards.

ment below what was already completely obvious from its briefs—that the Union, like the Company, interpreted the finality clause of its contract to bar enforcement of the Barrett award if the Sabella award would have survived judicial challenge.[7]

The Union urges, however, that it should be relieved of this concession. It offers three reasons for this unusual request, but none of them can withstand analysis.[8] Primarily, the Union contends that "the concession, if made, was wrong and should not be embodied in this Court's authoritative exposition of the national labor policy" (U. Br. at 15 n. 21). But the Union's position below cannot be "wrong" or "right" in a legal sense—it consti-

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[7] Given the position that the Union had expoused up until the time of oral argument, there can be little doubt that the Company's counsel are correct in their specific recollection that Local 759's attorney confirmed the Union's position during oral argument before the appellate court. (See Co. Br. at 8 n. 7.) The Company does not consider it necessary to resolve any potential conflict between its counsels' recollection and Mr. Sneed's lack of recollection as to "whether any such concession was made" (See U. Br. at 15 n. 21). If this Court considers such a resolution necessary, however, we respectfully pray that the Court obtain from the Fifth Circuit a tape or transcript of the oral argument. The Company had sought to include the transcript in the parties' Joint Appendix, but it was informed by the Fifth Circuit Clerk that oral argument transcripts are not available to the parties.

[8] The Union's second and third proffered reasons (U. Br. at 15 n. 21) have already been dealt with indirectly, and we will only briefly comment on them here. The Union's assertion that the Fifth Circuit did not rely on any such concession is not really accurate. Although it is true that the appellate court discussed conflicting case law on whether arbitral awards generally have a *res judicata* effect and went on to state that it would assume that they do (J.A. 75-77), it is clear that the court based that "assumption" on the fact that the parties (as well as Arbitrator Barrett) recognized that that is what they intended in their contract (J.A. 75, 77, 78; see n. 6, *supra*). Equally meritless is the Union's concomitant assertion that it is not certain that Union counsel made any concession in oral argument. As just discussed, there is little, if any, doubt that counsel made the statement and it is virtually irrelevant if he did not.

tuted only an admission that the parties agree that their contract bars enforcement of the Barrett award if the Sabella award withstands judicial scrutiny. The only thing "wrong" about the Union's position below is the fact that it makes it impossible to enforce the Barrett award—a fact that the Union now apparently recognizes.

In sum, the Union here not only seeks to raise substantive legal arguments that were not raised below [9]—a practice which this Court's decisions routinely disallow [10]—but it also seeks to rewrite the facts of this case to suit its new arguments. It is far too late, we submit, for the Union to contend that its contract does not now mean what the Union agreed it meant when this case was before the district and appellate courts. In short, because the Union now agrees that the Sabella award is judicially enforceable and because up to this point the Union has agreed that that fact would require vacating the Barrett award, the Fifth Circuit's judgment must be reversed.

B. The Court Should Reject The Union's Contention That Neither The Prior Court Order Nor The Conciliation Agreement Precludes Company Liability

In its brief to this Court, the Union does not defend the Fifth Circuit's clearly erroneous holding that Grace

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[9] See n. 3, *supra*. Similarly impermissible is the Union's *post hoc* assertion (U. Br. at 31 n. 27) that a binding Sabella award would not justify invalidating the Barrett award in its entirety because the Sabella award dealt with post-court order layoffs whereas some of the Barrett grievances involved layoffs which occurred prior to the district court order. As the Company pointed out in its Reply Brief in support of the Petition for Certiorari (p. 2 n. 2), the Union never raised this distinction before Arbitrator Barrett, before the district court, or before the court of appeals. Rather, the Union and the courts below consistently dealt with all layoffs as if they occurred while the district court order was in effect.

[10] See, *e.g.*, *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 182 (1934).

had no obligation to obey the 1975 district court order because it was eventually reversed on appeal (see Co. Br. at 32). Rather, the Union contends that its damages are not *damnum absque injuria*, as urged by the Company (Co. Br. at 36-37), and that traditional principles of contract law dictate the recovery of damages. We treat these contentions seriatim.

1. The Union does not take issue with the well-established principle that the improper issuance of an injunction is an error of the court and that neither a public nor a private tribunal has authority, in the absence of a bond, to provide relief to individuals who are injured by such an order (see Co. Br. at 36-37). Local 759 urges, however, that this "unexceptional proposition" is irrelevant because the Union's claim is for contract damages rather than for damages flowing from an erroneous court injunction (U. Br. at 32).

The Union's argument ignores the nature of the district court's order. Here the district court enjoined both the Company and the Union from applying the seniority provisions of their collective bargaining agreement. Even if the Union characterizes its claim as one for contract damages, it is clear that those damages flowed from both parties' inability to apply the contractual terms while the injunction was in effect.

In short, the Union's argument translates into nothing more than a contention that a party erroneously enjoined from carrying out its contract has actionable damages against the other party to the contract, who was also erroneously enjoined, for the alleged breach of contract caused by the injunction. But such damages flow no less from "an error of the court" than do the damages in any case that applies the doctrine of *damnum absque injuria*.

2. With respect to its "contract damages" claim, the Union argues (U. Br. at 33-34, 37) that the court order does not provide a lawful excuse for the Company's failure to comply with its union contract because the order

was "sought by the Company" and resulted from "one or both of the following acts of wrongdoing on the Company's part: (1) the entry into two inconsistent contracts, which entailed the knowing and willful breach of the Union's contract; (2) discrimination against women in the hiring process."[11] Under these "facts," the Union says, general contract principles dictate the rejection of an "impossibility" defense and the imposition of liability on the Company (U. Br. at 33-34).[12]

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[11] Although never articulated in its argument, the Union's statement of facts (U. Br. at 3-4) suggests that the Company's entry into the conciliation agreement was but a ploy to benefit female strike replacements at the expense of male strikers. Such a suggestion is baseless. Thus, there is not even a hint of such a motive in any of the six arbitral and judicial decisions rendered in this case and the prior litigation. Indeed, Arbitrator Sabella (J.A. 47), Arbitrator Barrett (J.A. 56) and the Fifth Circuit (J.A. 89) specifically found that Grace had operated in complete good faith in entering into the conciliation agreement and seeking a judicial determination of the proper course of conduct. Moreover, the joint appendix to the Fifth Circuit in the earlier litigation (*Southbridge Plastics v. Local 759*, No. 75-4416, pp. 73, 75-86) indicates that when the conciliation agreement was signed there were *only six* female strike replacements in a bargaining unit of over 450 employees. It is simply ludicrous to think that Grace would sign an EEOC conciliation agreement and initiate a federal court action in order to favor these six employees among the 450 employed by the Company.

[12] The Union also contends (U. Br. at 34-35) that this Court must defer to Arbitrator Barrett's determination regarding the effect of the district court order and conciliation agreement on the Company's liability. As we have shown in our prior brief (Co. Br. at 30 n. 24), however, a court is not concerned with the usual deference due arbitrators' awards when determining whether an award must be vacated because it violates law or public policy. Indeed, two of the cases we cited for that proposition (*Communications Wkrs. of America v. Mountain States T & T Co.*, 18 FEP Cases 281 (D. Colo. 1977), *aff'd*, 102 LRRM 2161 (10th Cir. 1978); *Telephone Wkrs. Union, Local 827 v. New Jersey Bell Telephone Co.*, 450 F. Supp. 284 (D.N.J. 1977), *aff'd*, 584 F.2d 31 (3d Cir. 1978)) involved the same kind of issue presented here—*i.e.*, the effect of a consent decree on an employer's liability under its collective bargaining agreement. Moreover, even if the Union were correct in suggesting that the

In effect, the Union argues this case as if it were one involving ordinary commercial transactions among private parties that are unaffected by broader statutory or public policy considerations. As we show below, however, this case and others like it are ill-suited to strict application of ordinary contract principles, and overriding policy considerations demand that employers not be held liable for actions taken pursuant to EEOC conciliation agreements and Title VII court decrees.[13]

First, it is clear that a "collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees Union v. Union Pacific Railroad Company*, 385 U.S. 157, 160-161 (1966). See also *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964). Rather, this Court's decisions

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Barrett award cannot be vacated unless this Court finds that the law or public policy forbids employer liability in this situation, the reasons set forth in the text fully support that proposition.

[13] The Union is simply wrong in asserting (U. Br. at 37) that the Company never argued below that it would violate the policy favoring voluntary compliance and conciliation to enforce an arbitration decision holding an employer contractually liable for taking actions required by a conciliation agreement. Indeed, in the Company's initial memorandum in support of summary judgment in the district court, Grace argued that the Barrett award should be set aside in its entirety (including its applicability to pre-court order layoffs) for just this reason. Understandably, this argument received less emphasis in the Fifth Circuit in view of the Union's treatment of all layoffs as if they occurred while the court order was in effect. Nevertheless, the Company devoted approximately four pages of its Fifth Circuit brief to arguing that the enforcement of the Barrett award violated the policy favoring voluntary compliance with and conciliation of Title VII claims (Brief for Appellee, Case No. 80-3661, pp. 39-42). This argument has been given renewed emphasis before this Court only because at this late date the Union now suggests, for the first time, that there is a legal distinction between layoffs which occurred before and after the district court order (see n. 9, *supra*).

(*id.*) recognize that such an agreement is a generalized code of conduct which is to govern the whole employment relationship and which is to guide the parties' actions during its term. In essence, such agreements tell the parties how they are to act over an extended period of time —usually three years. The nature of these agreements makes it imperative that the parties' obligations thereunder be suspended if it is determined that their "code of conduct" calls for actions that would be inconsistent with a paramount legal duty.[14] And this is particularly true when that determination is made under a statute (Title VII) that is *intended to* interfere with the employment relationship when elements of that relationship result in prohibited discrimination and when the determination is made by the very entities (the EEOC and the federal courts) that are Congressionally mandated to interpret and apply that statute.

Second, an employer's entry into a conciliation agreement which calls for actions implicating its union con-

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[14] See, *e.g.*, *Southern Conference of Teamsters v. Red Ball Motor Freight*, 374 F.2d 932 (5th Cir. 1967) (The paramount duty of neutrality under the National Labor Relations Act operated to suspend temporarily, by operation of law, the grievance and arbitration provisions of the collective bargaining agreement.).

As the Company pointed out in its prior brief (Co. Br. at 34-36, n. 27, and 39 n. 31), a number of courts have held that an employer cannot be liable for contractual or Title VII damages when its challenged actions were taken pursuant to a court order or the directive of an agency charged with interpreting and applying anti-discrimination statutes or Executive Orders. See also the cases cited at 40 n. 32 of that brief, which indicate that an employer cannot be held liable for backpay when it has assigned work to employees that the NLRB determines are entitled to the work even if an arbitrator determines that the employer's collective bargaining agreement requires that the work be assigned to another group of employees and that the employer should pay damages for not assigning work in accordance with the dictates of that contract. Finally, see *Stotts v. Memphis Fire Department*, 679 F.2d 541, 547-549, 558-559 (6th Cir. 1982), which is discussed *infra* in the text.

tract cannot be fairly analogized to a person who voluntarily enters two commercial agreements which conflict with each other. An EEOC conciliation agreement, like a union contract, is not an ordinary commercial agreement. Rather, it is an agreement between a governmental agency and a private party which requires the latter to abide by the law, albeit in specifics which are not detailed in the law.[15]

Moreover, it simply ignores reality to contend, as the Union does here, that employers "voluntarily" enter into conciliation agreements. To be sure, Grace could have "declined" the EEOC's "invitation" to conciliate the alleged violations, but the result would have been the institution of judicial enforcement proceedings with the same eventual result in the district court.[16] By engaging

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[15] The Union argues (U. Br. at 37-38) that the EEOC's determinations regarding employment discrimination are of no moment because Congress chose not to confer on that Agency the power to issue cease and desist orders or otherwise to compel private parties to act in accordance with the law. However, this argument ignores the whole structure of Title VII and the EEOC's vital role within that structure. The EEOC is charged with interpreting Title VII, determining, in the first instance, what actions are necessary to remedy violations, and seeking to obtain voluntary compliance through conciliation. Its determinations of what the statute requires are entitled to great deference. *Griggs v. Duke Power Company*, 401 U.S. 424, 433-434 (1971). It would be counterproductive, indeed, for this Court now to issue a ruling that counsels employers to ignore the EEOC's determinations because the Agency lacks the power to order the employer to cease its unlawful practices.

[16] The Union contends (U. Br. at 35 n. 29) that even at the time the conciliation agreement was signed it was clear that the law prohibited the relief contained in that agreement. Although we do not consider this argument particularly pertinent in view of the fact that Grace was acting pursuant to a district court order telling it *precisely* what the law required, it is clear that the Union's contention lacks merit.

First, the Union argues that, far from being unlawful, the Company's contractual seniority provisions were actually the type that were being *mandated* in the pre-*Teamsters* era. What the

in the conciliation process and "voluntarily" agreeing to undertake the remedies the EEOC found required by law, the Company simply acted in accordance with the Con-

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Union ignores, however, is that the pre-*Teamsters* line of cases mandating the substitution of plant seniority for departmental seniority involved situations in which employers had not totally excluded minorities from their workforces, but rather, had assigned minorities to less desirable departments in the bargaining unit. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 329-330, 333 (1977). In these circumstances, of course, a plantwide seniority system would be legitimate whereas a departmental seniority system would perpetuate the effects of the prior discrimination. Contrary to showing that the Company's seniority system was legitimate, the rationale of these cases clearly supported the view that modification of a plantwide seniority system would be necessary where that system perpetuates the discrimination embodied in an employer's exclusion of a protected group from all jobs in the bargaining unit.

Second, the Fifth Circuit itself had theretofore approved class-based affirmative relief in the form of hiring quotas to eradicate the continuing effect of past discrimination against a protected category. *NAACP v. Allen*, 493 F.2d 614, 619-620 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053, 1055-1056 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974). It was not a significant extension of the rationale of these cases to require a proportional layoff system to protect previously excluded classes from the effect of that earlier exclusion.

Third, at the time the conciliation agreement was signed, another district court in the Fifth Circuit had invalidated a plantwide seniority system because it perpetuated prior hiring discrimination against blacks. *Watkins v. United Steel Workers, Local 2369*, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975). The court found its conclusion dictated by the cases invalidating departmental seniority systems in the face of prior discriminatory assignment policies and by cases invalidating unions' work referral rules utilizing experience factors where the earlier exclusion of blacks had prevented those discriminatees from obtaining the experience necessary to qualify for referrals. 369 F. Supp. at 1225-1226. The court also rejected the defendants' contention that a ruling in their favor was compelled by the dictum in *Local 189, United Paperworkers v. United States*, 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), which Local 752 relies upon in the instant case. 369 F. Supp. at 1229. The court deferred

gressionally-declared "preferred means" of ending employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 37 (1974). It would be anomalous, in-

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ruling on the appropriate remedy, but indicated that the best solution would involve proportional layoffs such as those contained in Grace's conciliation agreement in the instant case. 369 F. Supp. 1232.

Although the *Watkins* case was later reversed by the Fifth Circuit after Grace had signed its conciliation agreement, the reversal was based at least in part on the fact that the employer's hiring practices had been nondiscriminatory for at least 10 years before the litigation regarding the seniority system commenced (which included all periods since the effective date of Title VII). 516 F.2d at 44. Indeed, the district court judge in the earlier Grace litigation specifically rejected the Union's contention that the Fifth Circuit's *Watkins* decision barred the proportional layoff remedy contained in the conciliation agreement. Rather, he found (*Southbridge Plastics v. Local 759*, 403 F. Supp. at 1187-1188) that the Grace case presented the specific questions left open in *Watkins*.

Fourth, although the Union here argues that the Fifth Circuit in 1978 would have reached the same conclusion irrespective of this Court's *Teamsters* decision, there is certainly nothing in the court's decision to support that contention. Indeed, although the Union asserts that the conciliation agreement remedies were "in the teeth of" *Local 189, United Paperworkers, supra*, the Fifth Circuit did not even cite that case in its 1978 decision. Nor did it cite its 1975 *Watkins* decision, which the Union says reaffirmed the *Paperworkers* ruling.

In sum, the Fifth Circuit's 1978 decision expressly based its reversal on *Teamsters* and on its own precedent holding that a seniority system can be judicially modified only to the extent necessary to ensure compliance with Title VII (see *Southbridge Plastics v. Local 759*, 565 F.2d 913, 915-916). It is only rank speculation to suggest that the court's ruling would have been the same irrespective of this Court's intervening *Teamsters* decision. And even if the court's ruling would have been the same, we have shown above that the remedy contained in the conciliation agreement was entirely consistent with, if not dictated by, then-existing precedent.

Finally, the Union certainly cannot contend that the propriety of such proportional layoff relief under Title VII was authoritatively settled back in 1974. This Court will very likely decide that question this term in *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, No. 82-185.

deed, if an employer's acquiescence in this favored process were considered analogous to the voluntary entry into an ordinary commercial contract which conflicts with its collective bargaining agreement. And it would be even more anomalous if signing a conciliation agreement somehow "tainted" a later judicial decree ordering the same remedy so as to render that decree legally insufficient to excuse the employer's conduct. Indeed, such a rule, in effect, would mean that actions taken pursuant to all Title VII consent decrees would be legally vulnerable to attack on the same ground. As discussed *infra*, this application of the Union's proposed rule would have horrendous policy implications.

Third, it similarly ignores reality to contend, as the Union does here, that an employer in Grace's situation "sought" the court order simply because the Company initiated the earlier litigation. The Company filed that suit not because it *wanted* to follow the conciliation agreement rather than its union contract, but because that was the only way it could bring together the real parties in interest (*viz.*, the incumbent male workers represented by the Union and the female workers represented by the EEOC) for a judicial determination of the conflict. In essence, the Company was a stakeholder, prepared at all times to do whatever the court required. Surely, it should not now have its liability turn on the fact that it conscientiously sought an expeditious judicial determination of its legal obligations.

Moreover, the Company's action in signing the conciliation agreement in no way precluded the Union from litigating the question of whether the relief in that agreement was required by Title VII. Thus, contrary to the Union's suggestion, it is clear that the district court injunction did not "result from" the earlier conciliation agreement. Even in the absence of that agreement, the district court would have been presented with the same EEOC factual and legal arguments in support of the remedies contained in the conciliation agreement. Al-

though the Union vehemently defended the contractual seniority system and vigorously opposed the remedy sought by the EEOC, the district court found that the females receiving the relief were "among the first females hired . . . when the [Company's] policy of complete exclusion of females was terminated in April 1974," that "it is beyond question that the female employees here failed to obtain earlier employment because of the [the Company's] previous policy," and that modification of the contractual seniority provisions was "*necessary to effectuate the goals of Title VII*" (403 F. Supp. at 1188; emphasis added). In essence, the district court's order was a fully litigated decree on the legality of the seniority system and the propriety of the relief contained in the conciliation agreement, rather than a holding based exclusively, or even primarily, on the Company's signature on the conciliation agreement. In sum, the court's order would have issued on the same facts in an EEOC enforcement action had the Company not conciliated.

Finally, if, as the Union contends, an employer's antecedent discrimination is itself sufficient employer "wrongdoing" to render a judicial remedial decree legally insufficient to excuse deviation from a union contract, then this rule would have truly profound implications. Such a rule, in effect, would mean that every time an employer takes judicially-mandated action in an employment discrimination case, it will have to compensate adversely affected employees. And this result would obtain even if the employer's action is, in fact, required to remedy Title VII violations, even if the court order is issued after full litigation of all issues rather than upon consent of the parties and even if the court order is upheld on appeal.[17]

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[17] If the Union is correct that an employer's antecedent discrimination nullifies its contract defense based on the judicial decree remedying that discrimination, then there is no analytically sound reason why that rule would not apply to court orders which are

The negative implications of such a rule can hardly be overstated. First, it would effectively do away with conciliation agreements and consent decrees as a means of eliminating employment discrimination. Employers would resist to the end any Title VII remedy which includes affirmative relief for a class of discriminatees because such relief, even though otherwise appropriate, would render it liable to adversely affected employees. As the Sixth Circuit stated in rejecting non-minority firefighters' claim that a white male should receive compensatory relief when he could show that he would have received a promotion but for the 20 percent promotion goal contained in a consent decree (*Stotts v. Memphis Fire Department, supra*, 679 F.2d at 559):

> [A]warding compensatory relief to non-minority employees would impose conflicting or inconsistent obligations on the City. This is particularly true of the constructive promotion suggestion. Under this alternative, each time the City attempted to promote minorities, it would be required to provide an equivalent amount of compensation to a non-minority employee who allegedly would have been promoted but for the decree. . . . This increased cost would destroy a primary incentive which motivated the City to enter the 1980 Decree. Thus, permitting [non-minority employees] to sue for compensation would be inimical to the policy of encouraging the settlement of Title VII actions.

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upheld on appeal as well as those that are later reversed. In the former cases, as in the latter, the inability to perform the contract would be due to the employer's "wrongdoing," *i.e.*, its prior discrimination.

Similarly, under this theory, there is no analytically sound basis for distinguishing between consent decrees and decrees that are issued after full litigation. And even if the Union's argument is read to depend upon the confluence of antecedent discrimination and an employer's agreement to the judicial remedy, acceptance of this argument would effectively remove Title VII consent decrees from the EEOC's enforcement arsenal.

See also cases cited in the Company's prior brief, Co. Br. at 34-36, n. 27, and 39 n. 31.

Second, acceptance of the Union's position would provide an overwhelming incentive for unions to refuse to participate in the conciliation process or to intervene in the remedy stage of Title VII judicial proceedings. As the EEOC pointed out in its *amicus curiae* brief to this Court (EEOC Br. at 19-20), the optimal solution to cases involving arguable conflicts between union contract rights and Title VII remedies is the application of rules which encourage all interested parties (EEOC, employers and unions) to work together to shape a remedy which will eliminate employment discrimination while protecting as much as possible the interests of all employees. Yet if this Court accepts Local 759's arguments, no union would ever engage in such an endeavor because to do so might collaterally estop it from asserting claims of contract damages. The inevitable effect of such a rule is to counsel unions to remain completely aloof from any negotiation or litigation of Title VII remedies and to institute subsequent arbitration or court actions for contract breach asserting that the Title VII decree is no bar to its claims because it resulted from the employer's own "wrongdoing" by virtue of its prior discrimination and/or its consent to a judicial decree.

Finally, the Union's argument regarding contract liability would quite simply place employers in an impossible and unfair position. As the *Stotts* court stated in considering an analogous claim for "reverse discrimination" damages for non-minority employees (679 F.2d at 559):

> [I]f the consent decree could constitute an actionable wrong, the City would be subject to dual obligations. The failure to enter a consent decree would leave the City potentially liable in the . . . discrimination action. On the other hand, the [non-minority employees] imply that compliance would subject the city to "reverse discrimination" suits . . . . The [non-

> minority employees'] position places the city in a "Catch-22" position of incurring liability for employment discrimination without regard to the action taken. The absurdity of placing employers in this position has been noted by several courts. [Citations omitted.]

Moreover, the *Stotts* court held, correctly we submit, that this potential for double liability is not justified in order to ensure that employers, rather than "innocent employees," bear the full price of their antecedent discrimination (*id.*). The court noted that even though it was the employer who had discriminated, non-minorities were the ones who had benefited from the illegal employment practices.

In sum, this Court should reject the Union's argument that neither conciliation agreements nor Title VII judicial orders relieve an employer of liability for breach of its union contract because they are occasioned by the employer's own wrongdoing. Grace recognizes, as the Union urges (U. Br. at 39-42), that collective bargaining agreements enjoy a favored position under national labor policy and that they are not lightly to be cast aside. Nevertheless, their position is not so exalted as to justify emasculation of the system for eliminating employment discrimination devised by the Congress and the federal courts.

C. Conclusion

For the foregoing reasons, Grace respectfully prays that the Fifth Circuit judgment be reversed and that the arbitration award of Gerald Barrett be vacated.

Respectfully submitted,

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DATED: February 18, 1983

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* A Partnership of Professional Associations and Professional Corporations.

Amicus Brief

SEP 17 1982

No. 81-1314

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

W. R. GRACE AND COMPANY,
Petitioner,

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS of AMERICA
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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IN THE

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Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioner, W. R. Grace and Company, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as enforced by the Equal Employment Opportunity Commission (EEOC), and most are signatories to collective bargaining agreements as well as parties to Title VII settlements, conciliation agreements and consent decrees. As such, they have a direct interest in one of the issues presented for the Court's consideration in the instant case—whether an employer may be held liable for back pay to laid off employees when the employer selected those employees for layoff pursuant to an EEOC conciliation agreement and a federal district court order enforcing that agreement rather than strictly following the terms of an existing collective bargaining agreement.

3. Because of its interest in both the orderly administration of the nation's civil rights laws as well as the relationship of such laws to collective bargain-

ing obligations, EEAC has filed briefs as Amicus Curiae with this Court in *Teamsters v. United States*, 431 U.S. 324 (1977); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *American Tobacco Co. v. Patterson*, 97 S. Ct. 314 (1982); and *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982). Because of this experience, EEAC is uniquely qualified to brief the Court on the legal and practical implications of the issues in this case.

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977); *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127 (1982).

5. The written consent of counsel for the petitioner, W. R. Grace and Company, has been filed with the Clerk of the Court. Efforts to obtain the consent of the counsel for the respondent, Local Union No. 759, were unsuccessful.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1981

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of Petitioner contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1974, EEOC investigated a Grace facility and determined that the Company had engaged in past sex discrimination, the effects of which were being perpetuated by seniority provisions in an existing collective bargaining contract. Threatened with a Title VII suit, the Company entered into a conciliation agreement with EEOC that had the effect of overriding the contract's seniority provisions by providing shift assignment and layoff preferences for female workers. The Union declined an invitation to sign the conciliation agreement, insisting instead on strict adherence to the contractual seniority system.

When layoffs were subsequently conducted pursuant to the conciliation agreement, the Union grieved on behalf of its members adversely affected. The Company responded by seeking a federal district court order enjoining the arbitration in a suit naming the Union and EEOC as defendants. The Commission counterclaimed and crossclaimed against the Employer and the Union, requesting a declaratory judgment that the provisions of the conciliation agreement were lawful and superseded any conflicting obligations found in the contract. In *Southbridge Plastics Division v. Local No. 759*, 403 F. Supp. 1183 (N.D. Miss. 1975), the Company was found to have engaged in illegal sex discrimination, and, under Fifth Circuit law prevailing at the time, the seniority system which perpetuated the effects of past discrimination was ruled unprotected by Title VII. Accordingly, the court held that the conciliation agreement superseded the seniority provisions and ordered the parties to abide by the agreement.

When the Company continued to follow the conciliation agreement as ordered, the Union appealed to the Court of Appeals for the Fifth Circuit without asking for a stay of the district court's order. During the pendency of that appeal, this Court handed down *Int. Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which held that a bona fide, neutral seniority system did not violate Title VII merely because it perpetuated the effects of prior discrimination. Relying upon *Teamsters*, the court of appeals in *Southbridge Plastics Division v. Local 759 and EEOC*, 565 F.2d 913 (5th Cir. 1978), reversed the district court and permitted arbitration of the grievances relating to the pre-*Teamsters* layoffs. Following that decision, the Company immediately reinstituted the contract's seniority system and began arbitration with the Union over layoffs conducted under the conciliation agreement.

The present suit arose out of two such arbitrations. In the first, the arbitrator rejected the Union's contention that back pay should be awarded to those adversely affected by the conciliation agreement. Because the layoffs were made pursuant to an EEOC determination and court order, the arbitrator found that the Company was not liable for failing to apply the contractual seniority provisions.

The Union, nevertheless, insisted that three additional layoff grievances be arbitrated, contending that they raised issues different from those involved in the first arbitration. The second arbitrator disagreed, finding the issues to be the same, but ruled that the first arbitrator had exceeded his authority because he had based his award on equity and not on the language of the collective bargaining agreement. He

then concluded that Grace had laid off senior males in violation of the seniority system and was liable to them for back pay. When the Company challenged the second arbitration award in district court, it prevailed on the ground that to penalize the Company for abiding by the court's earlier order would be contrary to the law and public policy.[1] The Fifth Circuit reversed, holding that the Company was not protected from liability by the 1975 district court order enforcing the conciliation agreement since the order was later reversed by the Fifth Circuit.

SUMMARY OF ARGUMENT

Settlements are not only favored by the law generally, they are the means preferred by Congress for enforcement of the nation's civil rights laws. If employers are to be encouraged to enter into settlement agreements, they must not be penalized for complying with those agreements, particularly where compliance has been ordered by a federal district court. Rather, employers must have assurance that any agreement settling an employment discrimination claim which is in keeping with prevailing interpretations of the law at the time the agreement is executed will protect them from a subsequent finding of liability on

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[1] The question before the district court was "whether, during the pendency of the [first] appeal [to the Fifth Circuit], the grievances which might have occurred during that time can now be arbitrated, or whether they are not subject to arbitration because of the binding effect of the Court's previous order." (Pet. for Cert. at 28a). The district court then concurred with the finding of the first arbitrator that "[u]nquestionably during the period of the violation, the employer was acting in concurrence with the District Court's order as it was required to do." *Id.*

the same facts but based on a changed interpretation of the law. Moreover, where a court enforcing the terms of a settlement orders both an employer and a labor organization to set aside the provisions of their collective bargaining contract in order to bring their practices into compliance with federal law, the employer may not be held liable for obeying that order.

In this case, the Company, by entering into a conciliation agreement after discrimination had been found by EEOC, acted strictly in accordance with the method preferred by Congress to resolve such disputes. The district court, after ruling the suspect collective bargaining provisions unlawful, approved the conciliation agreement and ordered the Union and Company to adhere to its dictates. By doing so, the court gave the settlement the force and effect of law. The Fifth Circuit, however, wrongly held that because the Company failed to anticipate this Court's subsequent decision in *Teamsters*, the Company had committed legal wrongs by complying with the conciliation agreement and refusing to disobey the district court's order.

Except in the most limited circumstances, judicial orders are to be complied with promptly and litigants who fail to do so place themselves in contempt of court. Because those before the bar do not have discretion to ignore trial court orders based on their subjective views that a higher tribunal will ultimately rule differently, the Company had no choice but to conduct employee layoffs as ordered.

Moreover, because the Company conducted layoffs according to the order, it may not be held liable for breach of the collective bargaining contract. Performance of a contractual provision is excused where

rendered impossible by a subsequent administrative ruling or judicial order. The Fifth Circuit ruling below is in conflict with this well settled rule of law, in that it would require compliance with a contractual provision during a time in which the provision had been declared unlawful by the district court.

The Fifth Circuit's decision, therefore, should be reversed. Employers like the Company here, who are willing to settle discrimination cases, should not be placed in the untenable position of being liable for actions taken with specific prior court approval.

ARGUMENT

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH TITLE VII'S PRIMARY POLICY OF ENCOURAGING VOLUNTARY RESOLUTION OF DISCRIMINATION CLAIMS AND VIOLATES THE FUNDAMENTAL PRINCIPLE THAT LITIGANTS MAY NOT BE HELD LIABLE FOR FOLLOWING THE MANDATE OF A COURT ORDER

A. The Company's Decision to Settle Job Bias Claims Through a Conciliation Agreement Was in Accord with and Sanctioned by Title VII's Preference for the Informal Resolution of Such Claims

The Company, by entering into the conciliation agreement following EEOC's determination that it had committed discrimination requiring remedial changes in its labor-management practices, acted strictly in accord with the method chosen by Congress for the enforcement of Title VII. To achieve the Act's objectives, Congress created the Equal Employment Opportunity Commission and established procedures by which the Commission could "settle disputes through conference, conciliation and persuasion . . . ." *Alexander v. Gardner-Denver Co.*, 415

U.S. 36, 44 (1974).[2] This Court has stated unequivocally that one of the fundamental policies underlying the administration of the civil rights laws is that cooperation and voluntary compliance are "the preferred means for achieving [the elimination of unlawful employment discrimination. . . ."] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (emphasis in original).[3]

Therefore, when confronted by EEOC with allegations of unlawful discrimination, the Company acted in a manner "that fully complied with the express intent of Congress" even though the settlement reached had the effect of modifying provisions of a preexisting collective bargaining contract. *EEOC v. AT&T*, 419 F. Supp. 1022, 1038, *aff'd*, 556 F.2d 167 (1977), *cert. denied*, 438 U.S. 915 (1978). *See also United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979) (Congress did not intend to prohibit the pri-

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[2] It has long been recognized, of course, that the termination of litigation through settlement is a judicially favored way of disposing of litigation. *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *Stewards v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978); *Petty v. General Accident Fire & Life Assurance Corp.*, 365 F.2d 419, 421 (3d Cir. 1966). Accord, *Stanspec Corporation v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972); *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

[3] *See also Carson v. American Brands, Inc.*, 101 S. Ct. 993, 998 n. 14 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) (there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation).

vate sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve.)

As the facts demonstrate, the employer and district court had little choice but to embrace a conciliation agreement that modified the seniority provisions of the collective bargaining agreement. It is undisputed that when EEOC made its determinations, the Company entered into the conciliation agreement and the district court issued its order, the prevailing weight of judicial opinion was that Title VII did not immunize seniority systems which perpetuated the effects of prior discrimination. As pointed out by Justice Marshall in his dissent in *Teamsters*, 431 U.S. 324, 378-380, "[w]ithout a single dissent, six Courts of Appeals have so held in over 30 cases, and two other Courts of Appeals have indicated their agreement, also without dissent."[4] Under these pre-*Teamsters* decisions, there is no apparent question that had EEOC proved its allegations at trial, the court under the governing law at the time would have been authorized to formulate at least the same remedy as contained in the conciliation agreement, and perhaps even a broader remedy affecting more severely the employment conditions of senior male employees.

Under such circumstances, those involved in discrimination disputes should not be required to bring

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[4] The collection of cases in Justice Marshall's opinion includes 15 Fifth Circuit decisions, not including *Teamsters*, that had invalidated seniority systems because they perpetuated the effects of past discrimination. This dissent went on to say that EEOC had reached the same conclusion in an unbroken line of EEOC administrative decisions and that "the overwhelming weight of scholarly opinion is in accord." 431 U.S. at 379, 380.

their troubles to the court of last resort before beginning serious settlement negotiations. "[S]ettlements are entered into because of the very uncertainties of outcome in litigation. . . .;" *Stewards v. American Airlines*, 17 FEP Cases 24, 27 (7th Cir. 1978), citing *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Surely, the judicial process would be ill-served by a ruling that made the outcome of settlements more uncertain than the outcome of litigation, particularly where, as here, the district court made explicit findings that the substantive Title VII allegations were supportable.

The Fifth Circuit's decision, however, would effectively compel the Company to ignore this policy favoring statutory settlement. In fact, nowhere in its opinion does it even refer to the Act's preference for settlements.[5] The court instead states:

> There is no question but that the company was in entire good faith in signing the conciliation agreement with the EEOC and following it. *But legally it was wrong.* Pet. for Cert. at 20a. (emphasis supplied).

Even though the district court's order approving the conciliation agreement operated *in favor* of the Company, the Fifth Circuit faulted the Company for not

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[5] To the contrary, the lower court's opinion states that the Company had failed to fulfill its legal obligations by agreeing with EEOC to settle the dispute: "There is nothing in our [previous opinion in *Southbridge Plastics*] which indicated that the employer was authorized to have followed the conciliation agreement." Pet. for Cert. at 14a. The Company may not "be found acting in accordance with its legal obligations when it was following the conciliation agreement." *Id.* at 15a.

having challenged the validity of the order through the appellate process and not having sought to block performance of the agreement by seeking a stay or taking a supersedeas bond pending a ruling. *Id.* at 19a. Stated more simply, the court of appeals would have the Company attack a settlement that it had entered into to avoid litigation, and which the district court had found necessary to remedy Title VII violations. It is difficult to understand how employers are to be encouraged to comply with Title VII's strong preference for encouraging voluntary settlement of employment discrimination claims if they subsequently may be required to seek to overturn that very settlement and also risk being held liable for not doing so, even after the agreement has the express approval of a federal district court.

B. The Overriding Remedial Purposes of Title VII Permitted the Employer to Enter Into a Conciliation Agreement That Modified the Seniority System

Under the final portion of its opinion, captioned "Fairness and Equity," the Fifth Circuit cites as an additional reason for holding the employer liable for breach of contract the fact that operation of the conciliation agreement resulted in layoffs of certain male union members who would not have been laid off if the seniority provisions of the collective bargaining agreement had been in effect. The court's discussion, however, ignores the policy that where a "union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement." *Emporium Capwell Co. v. Western Community Organization*, 420 U.S. 50, 70 (1975).

If the Congressional policy favoring informal resolution of employment discrimination claims is to remain a strong and viable one, settlement agreements that change a prior collective bargaining obligation in accordance with the law prevailing at the time the settlement is entered into must not be allowed to form the basis of a subsequent breach of contract claim if that law is changed by later judicial developments.

This case is not the first time a court has been "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 372. In the instant case, the Fifth Circuit would have the employer provide back pay to male union members who may not have been hired at all if the employer had not engaged in sex discrimination in its hiring policies. In such case, without the agreement the discriminatees would "perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits [their] inferiors." *Franks*, 424 U.S. 747 at 768.

Accordingly, this Court has said that because Title VII's policy of outlawing discrimination is to have the highest priority, a seniority system may be modified to insure implementation of the Act's strong public policy interest. *Franks, supra*, 424 U.S. 747 at 779; *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974). In *Franks*, this Court found "untenable the conclusion that [retroactive seniority] may be denied merely because the interests of other employees may thereby be affected." *Franks, supra*, 424 U.S. 747 at

775.[6] The *Teamsters* Court, of course, held that bona fide seniority systems are protected by § 703(h) of Title VII. In doing so, however, the Court did not eliminate altogether any remedy that would alter underlying collective bargaining obligations. Rather, in formulating the appropriate relief, it instructed the trial court to evaluate "the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees." 431 U.S. at 376.[7]

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[6] According ot *Franks*, seniority relief "may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." 424 U.S. 747 at 779, n.41. Further, the "denial of seniority relief to identifiable victims of discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of Title VII." *Id.* at 774.

[7] *See also Pullman Standard v. Swint*, 102 S. Ct. 1781 (1982); *American Tobacco v. Patterson*, 97 S. Ct. 314 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). All of these decisions reaffirm the holding in *Teamsters* that seniority systems are not illegal solely on the basis that they perpetuate the effects of past discrimination. For the reasons stated herein, however, those later decisions do not require the employer to be held liable for modifying a seniority system in order to effectuate a remedy clearly permissible under law existing at the time of settlement.

Moreover, Section 703(h), pre-*Teamsters* law and this Court's post-*Teamsters* line of seniority decisions make it clear that a seniority system nevertheless may violate Title VII if it was adopted with an intent to discriminate. Although this case involves no finding of discriminatory intent, a ruling setting aside the settlement would involve an improper second-

Lower courts when presented with similar situations have had to " 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair and what is workable.' " *Teamsters*, *supra*, 431 U.S. at 375, *citing Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973). For example, in *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), the Fifth Circuit considered objections to the settlement of widespread charges of employment discrimination in the nation's steel industry by the entry of consent decrees modifying, *inter alia*, the seniority provisions of collective bargaining agreements that had been negotiated with nine major steel companies. Despite the fact that the decrees altered the seniority rights of 73% of the employees in the country's basic steel industry, the court concluded that "the settlement has not been shown to be in any respect unlawful or improper, and hence its terms, conditions and benefits must go forward immediately in their entirety." 517 F.2d at 834.

The Company, therefore, cannot be held liable for its settlement of this case. Its entry into the conciliation agreement fulfilled Title VII's objective of informally resolving employment discrimination suits, an objective which may lawfully be obtained through its voluntary modification of a preexisting collective bargaining agreement.[8]

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guessing of the bases upon which the employer decided to settle the case. Where Title VII remedial principles support the terms of the settlement itself, the settlement should not form the basis for additional liability.

[8] Other important policy considerations regarding the administration of the civil rights laws would be furthered by

C. In Addition To Complying With The Purposes Of Title VII, The Company was Compelled To Obey The District Court's Binding Order That Required It To Follow The Conciliation Agreement, Not The Collective Bargaining Agreement

The Fifth Circuit wrongly rejected the Company's contention that the district court judge "had issued an order which was binding on the company to apply the conciliation agreement rather than the seniority provision of the collective bargaining agreement," ruling instead that the "company's assertion that it 'had no choice' but to obey the district court order cannot stand." Pet. for Cert. at 19a. The rule of law set forth in the Fifth Circuit's decision appears to be that a person under the jurisdiction of a federal district court is under no obligation to obey any order issued by such court if it might be reversed on appeal.[9] Such a rule, if permitted to stand, would not

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reversal of the Fifth Circuit's decision. The lower court held the employer liable for carrying out the consent decree despite the fact that Article XIX of the collective bargaining agreement specifically provides that:

> In the event that any provision of this agreement is to be found in conflict with any state or federal law now existing or hereafter enacted, it is agreed that such law shall supersede the conflicting provisions without affecting the remainder of these provisions.

Pet. for Cert. at 30a. In holding the employer liable for modifying a seniority system that specifically provides that it shall be superseded by applicable federal law (here the conciliation agreement), the Fifth Circuit virtually destroys the initiative for employers to agree to modify contractual provisions that appear to violate Title VII and invites further litigation of a case the parties agreed should be resolved.

[9] "[T]his Court's decision reversing the district court in *Southbridge Plastics* in terms forecloses as well the assertion of an obligation to obey its district court order." Pet. for Cert. at 19a.

only seriously undermine the orderly administration of the judicial process, it is in direct conflict with prior decisions of this Court.

The "basic proposition . . ." was recently underscored in *Maness v. Meyers*, 419 U.S. 449, 458 (1975) that:

> all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.[10]

See also *United States v. United Mine Workers of America*, 330 U.S. 258, 303 (1947) (interests of orderly government demand that the court's orders be respected and obeyed). It is clear that absent unusual circumstances, those before the bar do not have discretion to decide whether or not judicial instructions are to be obeyed, for "once the court has ruled, [those] involved in the action must abide by the ruling and comply with the court's orders." 419 U.S.

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[10] *Maness* recognized an exception to the general rule that judicial orders are to be complied with promptly pending appeal but only for a limited class of refusals based on Fifth Amendment grounds. This case, however, does not involve a question regarding the Respondent's constitutional rights, but rather rights provided by the seniority provisions of a collective bargaining contract. Such rights "are not indefeasibly vested rights but mere expectations derived from a collective bargaining agreement and subject to modification." *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971). See also *Franks v. Bowman Transportation Co.*, 424 U.S. 779 (1976) (employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest).

at 459. Accordingly, the district court in the instant case correctly stated that "during the pendency of the appeal, the order of the court was in effect and had to be obeyed by the parties." Pet. for Cert. at 32a.

Not only was the employer required to follow the terms of the conciliation agreement that had been approved by the district court, it obviously could not be required, as the Fifth Circuit would have it, to appeal the decision approving its own conciliation agreement. The Company had gone to the district court in the first place only to determine what the law required. It would be anomalous, indeed, to expect the Company then to appeal this decision and seek a stay of its order pending appeal. Indeed, as the prevailing party, the Company's standing to take such an appeal was questionable at best. The same cannot be said for the Union which, as the aggrieved party, nevertheless "did not seek to have a stay of the order during the pendency of the appeal, nor did the union seek to supersede the order in any manner." Pet. for Cert. at 26a. The Fifth Circuit excused this failure by stating that the Union, "[a]s any law abiding citizen is entitled to do, bided its time pending its appeal until it could win on appeal." (Pet. for Cert. at 18a). Nothing could be more antithetical to the settlement of Title VII cases than to place the burden of appeal upon the party obtaining court approval of the settlement while at the same time allowing an objecting party to benefit from its failure to attempt to protect its own interests pending appeal.

Moreover, to have ignored the district court's command would have placed the Company in contempt of court. According to *United Mine Workers, supra,*

330 U.S. at 294, until a court's "decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." 330 U.S. at 294, *quoting Howat v. Kansas*, 258 U.S. 181, 189, 190 (1922) (footnotes omitted).[11] This authority is not limited by a litigant's good faith belief that the order may be reversed on appeal. "A person who makes a private determination that an order is incorrect . . . may properly be convicted of criminal contempt for violation of the order *even if his or her private determination is later proven correct in the courts.*" *United States v. Stine*, 646 F.2d 839, 845 (3d Cir. 1981) (emphasis supplied) *citing Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Howat v. Kansas, supra.*[12]

Thus, the fact that a court order may later be ruled invalid has not been considered a defense in contempt proceedings brought against those refusing to comply with such orders. *Fernos-Lopez v. U.S. District Court*, 599 F.2d 1087, 1091 (1st Cir. 1979); *United States v. Seale*, 461 F.2d 344, 361-62 (7th Cir. 1972). In *San Antonio Telephone Company,*

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[11] In previous decisions the court below has stressed the recognized authority of federal district courts to enforce compliance with their orders through civil and criminal contempt proceedings. *See In re Timmons*, 607 F.2d 120, 123 (5th Cir. 1979); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822 (5th Cir. 1976).

[12] *See also Maness v. Meyers, supra*, 419 U.S. at 458; *Norman Bridge Drug Co. v. Banner, supra*, 529 F.2d at 827; *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 746 (7th Cir. 1976); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976).

Inc. v. American Telephone & Telegraph, 529 F.2d 694 (5th Cir. 1976), for example, the appellants had refused to comply with a trial court order requiring their appearance and production of records. They sought to excuse their conduct, in the words of the court, "only by showing that they expected to obtain a stay of the order either from the trial court or from this Court pending appeal." *Id.* The Fifth Circuit dismissed the contemnors' contention with the words, "This will not do," citing *Maness v. Meyers*, *supra*, 419 U.S. at 458. Inasmuch as a refusal to comply with a court order would not do in *San Antonio Telephone*, the Fifth Circuit clearly was wrong in not only approving, but encouraging, such conduct here. Its ruling is patently in conflict with "the basic proposition that all orders and judgments of courts must be complied with promptly." 419 U.S. at 458.

In reaching its conclusions, the Fifth Circuit stated that "in general the law is now *but also has in the past been* what the highest tribunal which considers the issue decides is the law." 652 F.2d at 1255. (Emphasis supplied). In support of its conclusion that the Company in the instant case was not bound by the district court's order, the court gives examples of "the usual retroactive effect of an appellate court decision reversing a lower court decision or the decision of an administrative agency . . ." *Id.* at 1256. Yet instead of discussing situations in which a party was held liable for obeying a court order later reversed, the court merely gives examples of persons acting solely on the basis of good faith beliefs that their conduct is lawful absent such an order. *Id.* at 1255, 1256. Throughout this lengthy litigation, however, the Company religiously followed the law prevailing at the time. It entered into the conciliation agreement whose provisions became legally binding

under the district court's order which relied on then current Fifth Circuit and other court interpretations of Section 703(h) of Title VII. When the appellate court invalidated the conciliation agreement, the Company immediately reinstituted the layoff provisions of the collective bargaining agreement. The Company, therefore, was not acting solely on the basis of good faith belief, it was doing precisely what court decisions had instructed it to do, what the district court had ordered it to do, and decisions such as *Maness* required it to do.

D. Performance of the Company's Collective Bargaining Agreement Obligations was Excused By The Later Superseding Judicial Order

The court below held that the district court's declaration that the seniority provisions of the collective bargaining agreement were unlawful and not to be followed did not excuse the Company's nonperformance of those provisions. The Company erred, according to the Fifth Circuit, "because it did obey a court order which could not stand on appeal." Pet. for Cert. at 19a. It concluded:

> the contention by the company that it was bound and had no choice but to obey is inconsistent with this Court's conclusion that the company had breached the contract by obeying the order. *Id.*

As now discussed, the decision of the court of appeals is contrary to established legal principles that excuse performance of contractual agreements where performance has been rendered impossible by governmental actions and that bar the award of damages for the issuance of a wrongful injunction.

It has been generally held that a contractual obligation is excused where performance has been ren-

dered impossible because of a subsequently issued judicial order.[13] The same principle has been established in cases involving an intervening governmental regulation or administrative order which prevents performance.[14] Under these principles, therefore, no liability may be attached to the Company for refusing to conduct employee layoffs pursuant to the collective bargaining agreement since such performance had been rendered impossible by the district court's order and EEOC's administrative decision.

Analogous court decisions recognize that the parties to a lawsuit should not be liable for court orders which later are ruled erroneous. For example, it is a well-settled rule that there can be no recovery for damages sustained by a wrongful issuance of a preliminary injunction in the absence of a bond. . . ." *Buddy Systems, Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1167 (9th Cir. 1976), *cert. denied*, 431 U.S. 903 (1977). While there is no question that the applicable law of the circuit in the instant case was later modified by the Supreme Court, the "error . . . is an error of the court, for which there is no recovery in damages unless the same is suffi-

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[13] *See Fritz-Rumer-Cooke Co. v. United States*, 279 F.2d 200, 201 (6th Cir. 1960) and cases cited therein; *United States v. Texas Construction Company*, 224 F.2d 289, 292 (5th Cir.), *cert. denied*, 350 U.S. 895 (1955), and cases cited therein; *Kiyoichi Fjuikawa v. Sunrise Soda Water Works*, 158 F.2d 490, 493 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947); *Reeder v. Mastercraft Electronics Corp.*, 297 F. Supp. 820, 832 (S.D.N.Y. 1969).

[14] *See Cook v. El Paso Natural Gas Co.*, 560 F.2d 978, 982 (10th Cir. 1977); *Consumers Power Co. v. Nuclear Fuel Services*, 509 F. Supp. 201, 210 (W.D.N.Y. 1981); *Interman, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82, 98 (E.D. Pa. 1973); *R. C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066, 1075 (S.D. Ga. 1972); Restatement of Contracts § 458 (1932).

ciently intentional as to be the basis of a suit for malicious prosecution, otherwise the damage is *damnum absque injuria.*" *United Motors Service v. Tropic-Aire*, 57 F.2d 479, 483 (8th Cir. 1932). *See also Coca-Cola Co. v. FTC*, 475 F.2d 299, 304 n.6 (5th Cir.), *cert. denied*, 414 U.S. 877 (1973).

Moreover, to insist that the collective bargaining agreement be performed in accordance with the Fifth Circuit's opinion would require enforcement of a contractual provision which, during the time in question, had been declared unlawful by the district court. While the Fifth Circuit recognized that "[i]t is elementary that a contract provision contrary to law is unenforceable and *does not bind the parties*," Pet. for Cert. 11a (emphasis added), it nevertheless held the clause to have been enforceable during a time in which the district court had declared it to be unlawful. This Court has said, however, that "the authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899).

According to the district court in the instant case, during the pendency of the appeal, its:

> order was the law of the case, as well as the law of the collective bargaining agreement. The court had specifically held that the conciliation agreement provisions had the effect of nullifying the seniority provisions in the collective bargaining agreement when such came in conflict with the provisions of the conciliation agreement. Pet. for Cert. at 31a.

In *McMullen* this Court specifically instructed that an unlawful contractual provision cannot be enforced

"by claiming damages or compensation for the breach of it. . . ." *Id.* at 663. Rather, "the law will leave the parties as it finds them." *Id.* at 670. *See National Transformer Corp. v. France Manufacturing Co.*, 215 F.2d 343, 361 (6th Cir. 1954); *Bauman & Vogel, C.P.A. v. Del Vecchio*, 423 F. Supp. 1041, 1044 (E.D. Pa. 1976).

Accordingly, under well-established principles governing the enforcement of court orders, and consistent with the underlying purpose of Title VII to encourage voluntary compliance with the statute, the Company in this case was justified in abiding by the conciliation agreement that modified the collective bargaining agreement. Affirmance of the Fifth Circuit's decision would be contrary to these principles and penalize the Company for complying with the law.

CONCLUSION

For the reasons cited above, the Amicus Curiae urges the Court to reverse the decision of the Fifth Circuit below and sustain the district court's order granting the Petitioner's motion for summary judgment vacating and denying enforcement of the arbitration award of Gerald A. Barret.

Respectfully submitted,

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No. 81-1314

In the Supreme Court of the United States

OCTOBER TERM, 1982

W. R. GRACE & COMPANY, PETITIONER

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether an arbitral award of back pay to employees who had been laid off by an employer pursuant to an EEOC conciliation agreement and a United States district court order compelling compliance with that agreement is unenforceable by a federal court in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185.

2. Whether the court of appeals exceeded its authority by refusing to enforce an arbitrator's award, because it concluded that the court had previously rendered a decision binding on the arbitrator regarding the proper interpretation of the collective bargaining agreement and because the arbitrator failed to cite any specific provision in the contract that supported his award.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1314

W. R. GRACE & COMPANY, PETITIONER

v.

LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is charged with the administration, interpretation and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.* An essential part of its mission is to conciliate disputes with employers accused of discriminatory employment practices in an effort to reach a voluntary settlement of these claims. Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).

One of the questions presented is whether the court of appeals erred in enforcing an arbitrator's award assessing liability against petitioner for complying with a conciliation agreement entered into with the EEOC. The Commission believes that the imposition of substantial liability on employers in such circumstances might materially impair the Commission's ability to conciliate future employment discrimination disputes by making

employers reluctant to agree to any settlement remedying charged employment discrimination if it requires a departure from the collective bargaining agreement that has not been consented to by the bargaining representative of the employees. Accordingly, the Commission has a substantial interest in this case.[1]

STATEMENT

1. In 1972, some of petitioner's employees filed charges of employment discrimination with the Equal Employment Opportunity Commission (Pet. App. 2a). After an investigation the Commission found that there was reasonable cause to believe that petitioner had engaged in unlawful employment discrimination against both women and blacks (*ibid.*).[2] The Commission found, *inter alia*, reasonable cause to believe that petitioner had unlawfully discriminated against women in hiring and job assignments, primarily by excluding them from production jobs, and that the seniority system provided for in the collective bargaining agreement between petitioner and respondent Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, was unlawful because it perpetuated the effects of past discrimination (Pet. App. 25a).[3] See

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[1] The Commission also believes that the aspect of the court of appeals' decision concerning the effect of the conciliation agreement could have been avoided in this case if the court of appeals had applied proper principles concerning judicial review of the first arbitrator's arbitration award. Thus, although the Commission has no programmatic interest in the question presented in the petition regarding the proper scope of judicial review of an arbitrator's award, we will discuss it as an alternative basis for reversal.

[2] The claims of race discrimination and their disposition were not part of the conciliation agreement that gave rise to the dispute in this case, and therefore race discrimination is not involved here.

[3] The Commission's October 5, 1973 reasonable cause determination found that of 690 employees at petitioner's Corinth, Mississippi facility, only 40 were female (Pet. App. 25a). All 40 women were employed in the clerical department; none were found in production positions. The Commission also found that the "[d]e-

Southbridge Plastics Division v. *Local 759, International Union of the United Rubber Workers*, 403 F. Supp. 1183, 1185 (N.D. Miss. 1975), rev'd, 565 F.2d 913 (5th Cir. 1978).

In accordance with Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), petitioner and the EEOC entered into conciliation negotiations. Respondent was aware of these negotiations, but, for reasons that do not appear in the record, it declined to participate in them (Pet. App. 3a). A conciliation agreement was reached on December 11, 1974, which modified, in certain respects, the procedures for layoff and "bumping" contained in the collective bargaining agreement between petitioner and respondent (*id.* at 2a). The procedures embodied in the conciliation agreement were designed to eliminate the adverse effect of the seniority system on newly-hired female workers and included a provision that women would be laid off only in proportion to their percentage in the bargaining unit (*ibid.*). See *Southbridge Plastics Division* v. *Local 759*, *supra*, 403 F. Supp. at 1185-1186. Respondent did not sign the conciliation agreement (Pet. App. 3a).

2. Faced with the conflicting demands of respondent and the EEOC, petitioner filed suit in July 1974 in the United States District Court for the District of Mississippi pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, seeking a declaratory judgment that the proposed conciliation agreement between it and the Commission overrode any conflicting provisions contained in the collective bargaining agreement. After the conciliation agreement was signed in December 1974, the EEOC was named as a nominal de-

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partmental and plant-wide seniority [system] perpetuates past discrimination against white women who, prior to 1970, were not employed in sufficient numbers and who continued to be confined to certain job classifications" and that "[s]ince [petitioner] has not employed black females in significant numbers in any category, the seniority system will only have a discriminatory impact upon them" (Pet App. 25a).

fendant in that suit, but it filed a cross-motion against respondent seeking a judgment that the conciliation agreement was valid. See *Southbridge Plastics Division* v. *Local 759*, *supra*, 403 F. Supp. at 1187. While the declaratory judgment action was pending, petitioner found it necessary to lay off certain employees in its production operations, and selected two employees in accordance with the conciliation agreement. Respondent then filed a grievance on behalf of those male employees with greater seniority who had been released in favor of less-senior women (Pet. App. 3a). Respondent counterclaimed against petitioner for an order compelling arbitration of the grievances.

The district court granted summary judgment in favor of the EEOC, holding that the remedies embodied in the conciliation agreement were necessary and proper to cure the effects of past hiring discrimination by petitioner and therefore to effectuate the goals of Title VII.[4] *Southbridge Plastics Division* v. *Local 759*, *supra*, 403 F. Supp. at 1188. Accordingly, the district court denied respondent's request for arbitration, since "under these conditions [arbitration] would be futile and pointless." *Ibid.* The court ordered the parties to abide by the terms of the conciliation agreement (Pet. App. 40a).[5] Respondent ap-

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[4] The district court noted that "the female employees who are here [receiving] relief from the last-hired first-fired policy contained in the bargaining agreement are among the first females hired by the employer when the policy of complete exclusion of females [from production, laboratory and maintenance departments] was terminated in April of 1974." 403 F. Supp. at 1188. The court found as well that "it is beyond question that the female employees here failed to obtain earlier employment because of Southbridge's previous policy of total exclusion of women from its work force in the job classifications here in issue." *Ibid.*

[5] The court's order stated:

(1) The terms of the conciliation agreement executed on December 11, 1974, by the plaintiff and the defendant, EEOC, are binding upon all the parties to this action; and

(2) Where the provisions of the collective bargaining agreement executed by the plaintiff and defendant, Local 759,

pealed, but did not seek a stay of the district court's order (Pet. App. 29a).

The court of appeals reversed the district court's judgment on the basis of this Court's intervening decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). See *Southbridge Plastics Division* v. *Local 759*, 565 F.2d 913 (5th Cir. 1978). Because there had been no showing that the seniority system was maintained with a discriminatory purpose, as required by *Teamsters*, the court of appeals held that the conciliation agreement could not be used to undermine petitioner's seniority system. 565 F.2d at 916-917. Accordingly, the court of appeals "grant[ed] the Union's counterclaim seeking arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the [collective bargaining] agreement." *Id.* at 917.

3. Petitioner immediately reimplemented the seniority provisions of the collective bargaining agreement. But the grievances arising out of petitioner's earlier application of the conciliation agreement and court order proceeded to arbitration as ordered by the court of appeals (Pet. App. 5a). The first grievance of a male employee was submitted to Arbitrator Sabella, and he denied the grievance (Pet. App. 41a-43a). The Arbitrator concluded that, since petitioner was not required to anticipate the circuit's reversal, it would be manifestly unfair to penalize petitioner for acting "in good faith in accordance with a legal court order" (*id.* at 43a).

Respondent then filed a second grievance that was submitted to a second arbitrator, Gerald A. Barrett (Pet. App. 44a-53a). Arbitrator Barrett acknowledged that the issue presented was "precisely the same issue heard and decided by Aribtrator Sabella" (Pet. App. 47a), and that under the finality clause of the contract, all decisions

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conflict with the provisions of the conciliation agreement executed by the plaintiff and defendant, EEOC, the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby.

within the jurisdiction and authority of the Arbitrator were "not only final and binding upon the parties in the immediate dispute, but additionally should be followed in all future like disputes between the same parties under the same contract" (*id.* at 49a). Arbitrator Barrett nonetheless decided that the prior award was not binding because Arbitrator Sabella had exceeded his jurisdiction by "fashioning a decision based upon equity utterly unrelated to any provision of the contract" (*id.* at 51a). Arbitrator Barrett then concluded that petitioner had breached the collective bargaining agreement and that the breach could not be excused by the district court's order or petitioner's reliance on the conciliation agreement (*id.* at 52a).[6]

4. Petitioner then filed the instant action under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, to set aside Arbitrator Barrett's award on the alternative grounds that the earlier Sabella award was a valid, enforceable award and binding precedent under the collective bargaining agreement and that, in any event, the Barrett award was unenforceable as contrary to public policy, because it penalized the employer for complying with a then-valid conciliation agreement and district court order (Pet. App. 6).

The district court entered judgment for petitioner (Pet. App. 22a-34a). The court ruled that Arbitrator Sabella had acted within his jurisdiction and that the Barrett award contravened public policy. The court reasoned that Arbitrator Sabella acted within the terms of the contract by noting that the "nondiscrimination"[7]

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[6] The employee whose layoff was arbitrated by Arbitrator Sabella had been layed off after the district court's order. Some of the three employees before Arbitrator Barrett had been layed off prior to the court order and at least one afterward. Neither of the parties has treated these factual differences between the arbitral situations as significant.

[7] Article XIII of the collective bargaining agreement provided:

> Both the company and the union agree that they will not discriminate against any employee because of sex, * * * and that

and "illegality"[8] clauses of the collective bargaining agreement could support petitioner's actions since the district court's prior order endorsing the Title VII conciliation agreement took precedence over contrary terms of the contract (Pet. App. 31a). The court also held that it "[did] not believe that public policy will permit" a damage award against the company for its compliance with a court order approving the conciliation agreement (*ibid.*). Accordingly, the court vacated the Barrett award (*id.* at 34a).

The court of appeals reversed (Pet. App. 1a-21a). It rejected petitioner's contention that the Sabella award was legitimately based upon the "illegality clause" of the collective bargaining agreement[9] on the ground that Arbitrator Sabella had not specifically referred to the contract or the illegality clause in his award (Pet. App. 11a). Moreover, the court of appeals concluded that its earlier decision in *Southbridge Plastics Division* v. *Local 759*, *supra*, had conclusively determined the question of whether petitioner's actions had constituted a breach of contract, leaving for the arbitrator's resolution only the issues of "which employees had been victims of the breach and damages for the breach" (Pet. App. 17a).

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both parties will abide by all applicable federal laws banning discrimination in regard to hire, promotion, and job assignments.

(Pet. App. 30a).

[8] Article XIV, Section 7, of the collective bargaining agreement provided:

> In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

(Pet. 7 n.8).

[9] The court of appeals implicitly accepted the argument that the contract required the Sabella award to be followed by Barrett unless it was beyond the former's jurisdiction to decide. The court's analysis focuses almost exclusively on the validity of the Sabella award (Pet. App. 10a-11a).

The court of appeals also held that the entry of the district court's judgment had not relieved petitioner of its responsibility to abide by the collective bargaining agreement because petitioner had made no effort to avoid that judgment by seeking a stay or by appealing (*id.* at 19a).

SUMMARY OF ARGUMENT

I a. National labor policy prefers arbitration over other methods of resolving disputes arising out of a collective bargaining agreement. See 29 U.S.C. 173(a); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960). Therefore, when a court is called upon to enforce an arbitrator's award, it has very little discretion not to do so. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Nonetheless, an arbitral award is nothing more than an interpretation of a contract, and, accordingly, a federal court cannot enforce the award if it conflicts with public policy. See *Hurd* v. *Hodge*, 334 U.S. 24 (1948).

Consistent with the strength of the federal policy favoring arbitration, the "public policy" exception is a very narrow one; not every asserted conflict with some policy justifies rejection of an arbitrator's award. Instead, the asserted public policy must be clearly established, and preferably recognized by Congress in a relevant statute, and it must be a policy designed to affect more than the specific litigants. See, *e.g.*, *Local No. P-1236, Amalgamated Meat Cutters* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976). It is not sufficient if the policy affects basically only one of the parties to the collective bargaining agreement. *International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F.2d 1345 (9th Cir. 1977). Finally, the arbitral award must directly and significantly contravene the asserted public policy. *Local 453, International Union of Electrical, Radio & Machine Workers* v. *Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963).

Under these standards Arbitrator Barrett's award, which was in direct contravention of the EEOC's reasonable conciliation agreement with petitioner, should be set aside. This Court has repeatedly recognized Congress' clear intention that Title VII discrimination claims should be resolved, if at all possible, by means of conciliation efforts by the EEOC. See 42 U.S.C. 2000e-5(b) and (f); *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). Indeed, conciliation agreements have become essential to the effective administration of Title VII by the Commission. Here, however, the arbitrator's award directly undermined and negated the accomplishment of the EEOC in negotiating this particular settlement, which all concede was reasonable when adopted. Moreover, the enforcement of this award would inevitably deter future employers from reaching conciliation agreements that in any way modify rights under a collective bargaining agreement with a union. See *EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980).

A decision to give such preeminence to the collective bargaining agreement would lead to an unfortunate, all-or-nothing resolution of employment problems concerning Title VII. On the other hand, if, contrary to the decision of the court of appeals, a Title VII conciliation agreement is recognized as a proper basis for judging the employer's actions, then unions will have an incentive to participate in the conciliation process, which will encourage fully negotiated settlements, rather than unending litigation.

b. Assuming, contrary to our submission, that the federal policy favoring Title VII conciliation agreements is not sufficient, by itself, to warrant setting aside an arbitrator's award, we submit that the award cannot stand if the conciliation agreement has been incorporated into an unstayed court order. The arbitrator's award in this case has punished petitioner for complying with a court order in deciding who to lay off, notwithstanding

that any other action by petitioner would have subjected it to a contempt citation. Certainly such an award, which is an affront to the court and offends basic notions of fairness to petitioner, cannot be enforced. See *Local 223, Utility Workers Union of America* v. *Detroit Edison*, No. 81-70694 (E.D. Mich. 1981).

II. As we have indicated previously, the arbitrator's interpretation of a collective bargaining agreement is ordinarily entitled to judicial enforcement. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960). Nonetheless, the court of appeals refused to accept arbitrator Sabella's award in favor of petitioner that was consistent with the conciliation agreement.

The court first held that the arbitrator had been unfaithful to the Fifth Circuit's previous decision in *Southbridge Plastics*, in which it had ordered the parties to arbitrate their dispute. But this Court has expressly held that a court in ordering parties to go to arbitration has absolutely no authority to determine on the merits whether the contract has been breached. *United Steelworkers of America* v. *American Manufacturing Co.*, *supra*. Accordingly, this ground for setting aside the Sabella award is manifestly incorrect.

Alternatively, the court of appeals faulted the arbitrator for failing to point to a specific provision in the collective bargaining agreement that supported his award. But this conclusion is directly contrary to this Court's statement that "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. 593, 596 (1960). Even a cursory examination of the "illegality clause" in the collective bargaining agreement demonstrates that it plainly could, and probably did, serve as the basis for Arbitrator Sabella's award. Accordingly, that award was not subject to judicial challenge and, under the contract, was binding on the second arbitrator.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ORDERING ENFORCEMENT AGAINST AN EMPLOYER OF AN ARBITRATOR'S AWARD THAT WAS INCONSISTENT WITH THE REQUIREMENTS OF A REASONABLE CONCILIATION AGREEMENT ENTERED INTO BETWEEN THE EMPLOYER AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

A. Although Federal Labor Policy Favors Arbitration, Courts Cannot Enforce Arbitral Awards That Violate Public Policy

We fully recognize that national labor policy strongly encourages use of arbitration as a means of resolving contract disputes between labor and management. See 29 U.S.C. 173(a); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 735-736 (1981); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, 377-379 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 242-245 (1970). Accordingly, federal courts are extremely reluctant to interfere with an arbitrator's award, recognizing that it is what the parties bargained for and is an eminently reasonable and readily available alternative to industrial strife. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 578. Indeed, as we discuss later, we believe the court of appeals in this case violated this principle when it declined to enforce Arbitrator Sabella's arbitral award favoring petitioner.

Nonetheless, at bottom, arbitral awards, if contested, still require a court's power to be enforced. And "[t]he power of the federal courts to enforce the terms of private agreements is at all time exercised subject to the restrictions and limitations of the public policy of the

United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents." *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948).[10] This principle applies as much to an arbitration award as it does to any other contractual arrangement. See, *International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977); *Local 453, International Union of Electrical, Radio & Machine Workers* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963) (Marshall, J.). It is, however, not an invitation for courts to reject willy nilly any award that offends their sensibilities, see generally St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1155-1157 (1977), but, instead, the public policy exception has been limited to a very few exceptional situations. See, *e.g.*, *Local No. P-1236, Amalgamated Meat Cutters* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *World Airways, Inc.* v. *International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800, 803 (9th Cir. 1978); *In re Muskegon Motor Specialties Co.*, 313 F.2d 841-842-843 (6th Cir.), cert. denied, 375 U.S. 832 (1963); *Goodyear Tire & Rubber Co.* v. *Sanford*, 540 S.W.2d 478, 483 (Tex. Civ. App. 1976). See also *Freeze* v. *Aro, Inc.*, 503 F. Supp. 1045, 1048 (E.D. Tenn. 1980); *Telephone Workers Union* v. *New Jersey Bell Telephone Co.*, 450 F. Supp. 284 (D. N.J. 1977), aff'd, 584 F.2d 31 (3d Cir. 1978); *Savannah Printing Specialties & Paper Products Local Union 604* v. *Union Camp Corp.*, 350 F. Supp. 632 (S.D. Ga. 1972).

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[10] One application of the principle announced in *Hurd*, and a relatively easier one to apply, is the situation where the arbitrator's award requires the employer to violate the law. See, *e.g.*, *General Warehousemen & Helpers Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 1293 (5th Cir. 1978), cert. dismissed, 441 U.S. 957, 443 U.S. 913 (1979); *Glendale Manufacturing Co.* v. *Local No. 520, International Ladies' Garment Workers Union*, 283 F.2d 936, 940 (9th Cir. 1960), cert. denied, 366 U.S. 950 (1961). We rely upon this branch of *Hurd* later, when we consider the effect of the district court's order requiring petitioner to abide by the conciliation agreement. See pages 20-22, *infra*.

Deciding whether a particular policy requires setting aside an arbitrator's award is no easy task and the lower courts have generally not attempted to establish principles broader than the specific case requires. Nonetheless, certain broad requirements have emerged that reasonably limit the scope of the exception without eliminating it. First, the existence and importance of the asserted public policy must be clear beyond dispute, which generally requires that the legislature has itself recognized the policy and that it thus is reflected in the form of some legislation. Compare *Local No. P-1236, Amalgamated Meat Cutters* v. *Jones Dairy Farm, supra*, 680 F.2d at 1144 (award violated policy of the Meat Inspection Act, 21 U.S.C. 601 *et seq.*); *General Warehousemen & Helpers Local 767* v. *Standard Brands, Inc., supra*, 579 F.2d at 1293 (award is "repugnant" to the National Labor Relations Act) with *Johns-Manville Sales* v. *International Association of Machinists, Local Lodge 1609*, 621 F.2d 756, 759 (5th Cir. 1980) (award enforced when policy asserted is only one of general concern for health).

Second, the public policy concern must extend beyond the protection of the particular litigants. In other words, interests of third parties must be implicated that require protection by the court. Thus, in *World Airways, Inc.* v. *International Brotherhood of Teamsters, Airline Division, supra*, 578 F.2d at 804, the court denied enforcement of an arbitrator's award reinstating an apparently incompetent pilot out of concern for air travelers and "the horrible toll in human life that air crashes can take." Similarly, in *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976), the court disallowed arbitration of a matter already within the bankruptcy court's jurisdiction in order to guarantee that the rights of creditors were protected. By contrast, in *Johns-Manville, Sales* v. *International Association of Machinists, supra*, the public interest in limiting smoking largely affected only the employees and therefore the court enforced the arbitral award striking down a no-smoking rule adopted by the employer. 621 F.2d at 759.

Third, the adverse effect of the arbitral award on the asserted public policy must be direct and unavoidable. In *Local 453, International Union of Electrical, Radio & Machine Workers* v. *Otis Elevator Co.*, *supra*, 314 F.2d at 29, for instance, the court held that there was no real conflict between the award and public policy, because the policy affected by the arbitrator's refusal to uphold a discharge for gambling—which the district court felt would encourage criminal activity—could be, and in that case had been, ably served by a criminal prosecution. See also *International Association of Machinists, District No. 8* v. *Campbell Soup Co.*, 406 F.2d 1223 (7th Cir.), cert. denied, 396 U.S. 820 (1969).

By setting out these three limiting requirements, we do not mean to suggest that there may not be other factors that should enter into efforts to balance the national labor policy favoring arbitration with conflicting public policy adversely affected by an arbitrator's decision. Certainly the extent to which deference to a particular public policy has undermined the purposes of collective bargaining should also be considered. See pages 19-20 *infra*. In any event, we submit that if the adverse effect of an arbitral award on public policy satisfies each of the three criteria set out above, then a federal court cannot enforce that award under *Hurd* v. *Hodges*, *supra*.

B. The Barrett Award In This Case Conflicts With The Congressional Policy Favoring The Resolution Of Title VII Disputes By Means Of Conciliation Rather Than Litigation And Accordingly The Court Of Appeals Erred In Ordering The Award Enforced

The decision of the second arbitrator requiring petitioner to enforce the collective bargaining agreement has directly undermined and negated the EEOC's conciliation agreement with petitioner. Since the arbitrator's award thus conflicts with a clearly established congressional policy of undisputed importance in the resolution of the mass of Title VII litigation, the court of appeals erred in ordering the Barrett award enforced.

This Court has recognized that Congress' decision to establish the EEOC and to invest it with authority and responsibility to attempt to conciliate disputes under Title VII, evinced clearly its intention that voluntary settlement is the preferred method of resolving such disputes. Thus, in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 44 (1974) (citations omitted), this Court stated:

> Congress enacted Title VII * * * to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

See also *EEOC* v. *Occidental Life Insurance Co.*, 432 U.S. 355, 368 (1977); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1980); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 211 (1980) (Blackmun, J., concurring).[11]

Under Title VII, a person claiming to be aggrieved by an unlawful employment practice must file a charge with the Commission prior to instituting a civil action in the district court. 42 U.S.C. 2000e-5(b) and (f). When a charge is filed and the Commission determines, after investigation, that there is reasonable cause to believe that the charge is meritorious, it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). "Congress [thus] chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked." *Emporium Capwell Co.* v. *Western*

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[11] Just last Term in *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 9, this Court pointed out that "[t]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace."

Addition Community Organization, 420 U.S. 50, 72 (1975); *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944, 947-948 (8th Cir. 1974) (EEOC must attempt conciliation prior to filing suit); 118 Cong. Rec. 7563 (1972) (remarks of Congressman Perkins). See also *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1980) ("The Commission's statutory duty to attempt conciliation is one of its most essential functions."); *EEOC* v. *Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 847-848 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

Consistent with Congress' intent, the conciliation agreement is a significant tool used by the Commission in resolving the large number of cases filed with it. For example, in fiscal year 1981, out of 2,499 cause findings, the Commission successfully reached 500 conciliation agreements (20%) with respondents. Similarly, in fiscal year 1980, out of 1,520 cause determinations, 308 conciliation agreements (20%) were entered.[12] In sum, there is a clear public policy supporting voluntary settlements through conciliation with the EEOC of Title VII discrimination suits.

It is equally plain that the court of appeals' ruling enforcing the Barrett Award would directly and substantially impair that policy. The imposition of monetary liability upon an employer who has complied with a reasonable conciliation agreement, can only dissuade employers in future cases from entering into conciliation agreements with the EEOC. See *Dennison* v. *City of Los Angeles Department of Water & Power*, 658 F.2d 694,

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[12] In fiscal year 1979, out of 2,115 cause determinations, 480 conciliation agreements (22%) were entered. In fiscal year 1978, 2,231 cause determinations resulted in 1,425 conciliations (64%); in 1977, 6,498 cause determinations resulted in 2,108 conciliations (32%). See 1981 EEOC 16th Ann. Rep. 5; 1980 EEOC 15th Ann. Rep. 36; 1979 EEOC 14th Ann. Rep. 26; 1978 EEOC 13th Ann. Rep. 58; 1977 EEOC 12th Ann. Rep. 58.

696 (9th Cir. 1981). See also *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982); *EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232, 1238 (6th Cir. 1980); *Telephone Workers Union* v. *New Jersey Bell Telephone Co.*, 450 F. Supp. 284, 298 (D.N.J. 1977), aff'd, 584 F.2d 31 (3d Cir. 1978).

A prudent employer, faced with a union refusal to engage in conciliation, would henceforth have one eye cast to future arbitration liability. This problem becomes particularly acute because even when it appears settled that a provision in a collective bargaining agreement is discriminatory and therefore must be modified to comply with Title VII, the employer faces the prospect that a later construction of Title VII will leave it liable for damages. Cf. *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 9. Thus, enforcement of such arbitration awards would unavoidably render employers less willing to provide any relief involving departure from a collective bargaining agreement, until there is a final and costly adjudication of Title VII claims.

Finally, the effect of this decision will extend well beyond the parties to this collective bargaining agreement. The arbitral award has the immediate effect of negating the EEOC's attempt to conciliate this dispute fairly. Moreover, the policy favoring conciliation is also designed to expedite case resolution. Enforcing awards such as the Barrett award would, in the long run, injure employers and employees alike by undermining the ability of the EEOC to perform its statutory mission of conciliating disputes, and thereby requiring more cases to be processed through the courts. This deterrent effect on the accomplishment of an important public policy is exactly the kind of situation in which courts have traditionally refused to enforce an arbitrator's awards. See, *e.g.*, *Local No. P-1236, Amalgamated Meat Cutters* v. *Jones Dairy Farm*, *supra*; *Goodyear Tire & Rubber Co.*

v. *Sanford, supra.* Accordingly, we submit that the policy favoring conciliation of Title VII disputes is one of those few public concerns that are sufficiently strong and would be sufficiently injured by inconsistent arbitrators' awards (essentially disregarding the Title VII conciliation agreements) that such awards must be denied enforcement by a federal court.[18]

The court of appeals' analysis is devoted largely to the question whether the arbitrator's award actually violated Title VII and thereby was unenforceable. The court considered the question at least implicitly in terms of the retroactivity of this Court's decision in *Teamsters.* The flaw in this line of analysis, however, is that it fails to recognize that judicial scrutiny of a settlement does not call for a determination of "actual" Title VII law. "[S]ettlements are entered into because of 'the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense.'" *Airline Stewards & Stewardesses Association, Local 550* v. *American Airlines, Inc.,*

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[18] We are not arguing that every conciliation agreement must necessarily prevail over a collective bargaining agreement, as interpreted by an arbitrator. For instance, if the conciliation agreement were found not to be a bona fide attempt to settle a discrimination claim, then it should not prevail. See *EEOC* v. *McCall Printing Corp., supra,* 633 F.2d at 1238. Thus, there must be an arguable violation of Title VII that justifies the conciliation agreement. There is no allegation of bad faith in this case nor, in light of the district court's initial decision in *Southbridge Plastics Division* v. *Local 759, supra,* ordering the consent decree to be followed, would such an argument be credible here. See note 19, *infra.*

In addition, we do not contend that a conciliation agreement that is itself properly determined to be a violation of law, Title VII or otherwise, should preclude enforcement of an arbitral award. Respondent has not, however, challenged the conciliation agreement, except as it has modified the collective bargaining agreement. Nor have the required administrative remedies been invoked that are a prerequisite to assertion of a Title VII claim in court.

573 F.2d 960, 963 (7th Cir. 1978), cert. denied, 439 U.S. 876 (1978), quoting *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1969). Therefore, it is plainly inappropriate in reviewing the reasonableness of the conciliation agreement to decide the merits of the controversy, unless it can be said that no reasonable litigant could enter into such an agreement. See *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). Obviously, in this case no such claim can be made because of the state of the law prior to *Teamsters*.[14] Our submission is that since Congress has chosen conciliation rather than litigation as the preferred means of resolving Title VII disputes, conciliation agreements, if reasonable, should be given the same effect as Title VII's actual requirements for purposes of enforcing an arbitral award. If the award is inconsistent with the conciliation agreement, then it is unenforceable.

Although this result superficially may appear to undermine the collective bargaining process, this rule will in fact encourage bargaining in a situation where it can be particularly useful. The optimal solution to cases involving an arguable conflict between terms in a collective bargaining agreement and Title VII is to have all three interested parties—EEOC, employer and union—attempt to resolve the issues amicably through conciliation. Unfortunately, absent a charge against the union, nothing compels it to participate in this process, and, what is worse, the decision below would essentially reward the union for refusing to participate by upholding substantial arbitral awards for the union's members. If the conciliation agreement must be recognized, however, then the union would have a substantial incentive to participate in the conciliation process. In that way the union could help shape an agreement that would eliminate discrimination in the work place while protecting as much as possible the interests of all the employees. Certainly the participa-

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[14] This Court in *Teamsters* rejected the position that had been taken by six courts of appeals. See 431 U.S. at 378.

tion of the union in the conciliation process would offer a greater opportunity for a reasonable accommodation of the various affected interests than is possible when the union for unstated reasons refuses to negotiate at all. Thus, a ruling recognizing the preeminance of the conciliation process would only require the collective bargaining process to adjust to the requirements of Title VII. The holding of the court of appeals on the other hand would virtually eliminate the conciliation process as a practical matter in all cases where the violation of Title VII is arguable—a situation where conciliation can often be most valuable.[15]

C. Since Compliance With The Conciliation Agreement Was Mandated By Court Order, Enforcement Of The Barrett Award Also Offends The Public Policy Favoring Obedience To Court Orders

The policy considerations militating against enforcement of the Barrett award are especially strong here since petitioner's lay-off decision was made under a federal district court's order that the conciliation decree's provisions took precedence over the collective bargaining agreement. Thus, not only did the district court confirm, under then applicable case law, the necessity and reasonableness of the conciliation agreement as a Title VII remedy, it also mandated that the parties follow the agreement's terms. Respondent, the only party with an interest in seeking a stay, did not ask for one from the district court or from the court of appeals.[16] In the

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[15] Indeed, where the collective bargaining agreement plainly violated Title VII, *i.e.*, where this Court has rendered a final decision on the issue, the union would at all events have a strong incentive to conciliate simply because an arbitral award in undisputed violation of a federal statute is unenforceable. See note 10, *supra*.

[16] Under Fed. R. Civ. P. 62(c), respondent could have sought a stay of the district court's order. The court of appeals suggested that the company "could have appealed" or "could have asked for a stay or supersedeas" (652 F.2d at 1258). This suggestion is

absence of a stay, the court's order was enforceable, and violation of it by petitioner could have been punishable as contempt. See 28 U.S.C. 1651(a) (All Writs Act); *Plaquemines Parish Commission Council* v. *United States*, 416 F.2d 952, 954 (5th Cir. 1969). As we have indicated, a distinct branch of the public policy exception to the enforcement of arbitral awards concerns awards that would require one of the parties to violate the law. See note 10, *supra*. This policy surely applies where the litigant would be required to disregard a valid court order to avoid back pay liability.

The court of appeals' statement that "this Court's decision * * * in *Southbridge Plastics* * * * forecloses as well the assertion of an obligation to obey the district court order" (652 F.2d at 1259) simply ignores the enforceable obligation imposed upon petitioner to follow that order until appellate disposition of the case. Petitioner was simply not free to disregard the court's order, until it was reversed. Cf. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293-294 (1947).

Plainly, the Barrett award punished the company for complying with an enforceable court order. It accordingly contravened the important public policy that the orders of the courts must be respected and complied with until set aside.[17] See generally *Howatt* v. *Kansas*, 258

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tantamount, however, to saying that the company ought to have resisted entering into the settlement, a contention which, as we have shown, ignores the reasonableness of the conciliation agreement as of the time it was entered and also undermines the congressional policy favoring conciliation.

[17] A party's contractual obligations may be excused by judicial or governmental orders rendering performance impossible. *The Kronprinzessin Cecilie*, 244 U.S. 12 (1917); *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 994-996 (5th Cir. 1976) ("fundamentally coercive acts of Government, whatever their form, constitute an excuse for breach * * *"); *Cook* v. *El Paso Natural Gas Co.*, 560 F.2d 978, 982 (10th Cir. 1977); *Kuhl* v. *School District No. 76*, 155 Neb. 357, 51 N.W. 2d 746 (1952). A defense has been recognized as well where the order under which the party is acting is later declared invalid. See U.C.C. § 2-615(a) (Current).

U.S. 181, 189-90 (1922); *United States* v. *United Mine Workers of America*, *supra*, 330 U.S. at 293; *Walker* v. *City of Birmingham*, 388 U.S. 307, 314 (1967). Cf. *Lucsik* v. *Board of Education of the Brunswick City School District*, 621 F.2d 841, 842 (6th Cir. 1980); *Coca-Cola Co.* v. *FTC*, 475 F.2d 299, 304 n.6 (5th Cir. 1973); *Pepsico, Inc.* v. *FTC*, 472 F.2d 179, 187 (2d Cir. 1972). For this reason alone, it should not have been enforced.

These principles have been recognized expressly by the only other court which, to our knowledge, has addressed the question of an employer's liability under a collective bargaining agreement for actions taken in conformance with a Title VII remedial decree entered by a district court, but later disapproved by a higher court in light of the *Teamsters* decision. See *Local 223, Utility Workers Union of America* v. *Detroit Edison Co.*, No. 81-70694 (E.D. Mich. 1981) (Pet. App. 54a). There, as here, the district court in a prior Title VII suit had entered a remedial decree containing seniority relief for discriminatees based, in part, on the alleged illegality of the seniority system. *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973). Eventually, that decision was vacated in light of *Teamsters*, and the union initiated an action under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, seeking an order compelling arbitration of grievances filed by employees who were affected by employment decisions made pursuant to the court decree. In declining to order arbitration, the district court, like the district court here, explicitly recognized that public policy bars a damage award under these circumstances and ruled that compliance with an enforceable court order should not be a basis for an arbitral award (Pet. App. at 56a). This conclusion, we submit, properly upholds the inviolability of court orders and should similarly be adopted here.

II. THE COURT OF APPEALS ERRED IN VACATING THE SABELLA AWARD, IN FAVOR OF THE LATER BARRETT AWARD, SINCE ARBITRATOR SABELLA'S DECISION DREW ITS ESSENCE FROM THE CONTRACT

Although the EEOC's interest in this case is primarily to have its efforts at conciliation of Title VII disputes upheld as a valid basis for refusing to enforce an arbitrator's award that is inconsistent with a conciliation agreement reached between an employer and the Commission, we nonetheless feel constrained to address briefly the other question presented in the petition in this case, viz., whether the court of appeals erred in refusing to enforce the first arbitral award that was fully consistent with the EEOC's conciliation agreement. In our view the decision of the court of appeals with regard to the Sabella award is inconsistent with settled principles of judicial review of an arbitrator's decision and therefore represents a significantly easier ground for decision by this Court, albeit one of less significance to the Commission.

As we have indicated, federal policy clearly favors private dispute resolution through arbitration of conflicts arising under collective bargaining agreements. See 29 U.S.C. 173(d); *United Steelworkers of America* v. *American Manufacturing Co.*, *supra*, 363 U.S. at 568; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 578; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra*. Accordingly, because the "arbitrators' construction [of the contract is what the parties] bargained for" and because the interest in finality of these awards would otherwise be impaired, "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 599, 596. We submit that the court of appeals gave insufficient heed to these principles in evaluating the

first arbitral award—the Sabella Award—issued in this dispute.[18]

A. The Court Of Appeals Erred In Ruling That Its Prior *Southbridge Plastics* Decision Removed From the Arbitrator's Authority The Question Of Breach Of Contract

The court of appeals' initial error is its conclusion that its prior decision in *Southbridge Plastics*, *supra*, had determined that "the employer had breached the contract" and "left as the only issues before the arbitrator which employees had been victims of the breach and damages for the breach." 652 F.2d at 1257. The earlier *Southbridge Plastics* opinion established only two propositions: (1) that in light of this Court's holding in *Teamsters*, the alteration of petitioner's contractual seniority system was not required under Title VII and therefore was subject to objection by respondent and (2) that petitioner was obligated to arbitrate grievances arising out of its interim use of the conciliation agreement.

The court of appeals in its opinion relied upon language in the earlier *Southbridge Plastics* decision which it believed "referred unmistakably to the company's action [in following the conciliation agreement] as a 'breach' of the binding contract * * *." Pet. App. 15a. That statement, however, is of no significance to a proper resolution of this case, because there was never any question that petitioner had failed to comply with the contractual seniority provisions. The question in the earlier litigation was whether petitioner's departure from the seniority provisions was justified by the conciliation agreement. The court of appeals held that it was not. The contractual issue in this case is whether other provisions of the collective bargaining agreement allowed petitioner to dis-

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[18] The court of appeals acknowledged that "the core inquiry in this case, as both parties recognized, is whether the Sabella award can stand * * *." Pet. App. 9a. Thus, there is no dispute in this case as to the *res judicata* effect of an arbitrator's award generally.

regard the seniority provisions. Nothing in the court of appeals' prior decision dealt with that question.

Moreover, nothing in that decision could properly decide the meaning of the collective bargaining agreement. It is axiomatic that an order to arbitrate does not, and may not, constitute a ruling on the merits of the underlying dispute. This Court, in *United Steelworkers of America* v. *American Manufacturing Co., supra*, 363 U.S. at 567-568 (emphasis added), made this unmistakably clear, when it stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. *Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.*

See also *Nolde Brothers* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 249 (1977). Thus, the court of appeals' reliance on its earlier judgment ordering arbitration is wholly misplaced.

B. The Court Of Appeals Impermissibly Substituted Its View Of The Contract For That Of Arbitrator Sabella

The court of appeals' conclusion that Arbitrator Sabella's "decision departed from the collective bargaining agreement" is premised on the notion that he exceeded his authority by deciding the case on the basis of general principles of equity and fairness which were contrary to the terms of the contract. The decision to vacate Arbitrator Sabella's award is no more than a reevaluation of the merits of the underlying contractual controversy and is plainly inconsistent with the role of a court reviewing an arbitrator's decision. See *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. Under *Enterprise Wheel*, the arbitrator's decision as to what the contract means is binding so long as he has "con-

fined [himself] to [the] interpretation and application of the collective bargaining agreement" and his words do not "manifest an infidelity to this obligation." *Ibid.* Stated differently, the award is valid "so long as it draws its essence from the * * * agreement." *Ibid.*

The courts use varying language to describe the standard for measuring arbitral "infidelity" to the contract. Thus in *Wire Service Guild* v. *UPI*, 623 F.2d 257, 261 (2d Cir. 1980), the court reasoned that "[w]hen arbitrators explain their conclusions * * * in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented * * *, quoting *Andros Compania Martima* v. *Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978)." Similarly, in *Ludwig Honold Manufacturing Co.* v. *Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969), the court held that the arbitrator's award "'draws its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention * * *." See also *International Union of Electrical, Radio & Machine Workers* v. *Peerless Pressed Metal Corp.*, 489 F.2d 768, 769 (1st Cir. 1973); *Amoco Oil Co.* v. *Oil, Chemical & Atomic Workers International Union, Local 7-1, Inc.*, 548 F.2d 1288, 1294 (7th Cir. 1977); *Kewanee Machinery Division* v. *Local Union No. 21, International Brotherhood of Teamsters*, 593 F.2d 314, 317-318 (8th Cir. 1979); *Holly Sugar Corp.* v. *Distillery, Rectifying, Wine & Allied Workers International Union, AFL-CIO*, 412 F.2d 899, 903 (9th Cir. 1969). See generally Kaden, *Judges and Arbitrators Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267 (1980); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1149 (1977).

Here, the arbitrator concluded that petitioner should not be liable under the contract because the company "was acting in concurrence with the District Court's order *as*

it was required to do" (emphasis supplied). There exists an entirely plausible basis in the contract to justify this view. The illegality clause of the contract specifies that "[*i*]*n the event that any provision of this Agreement is found to be in conflict with* any State or *Federal Laws* now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions" (Pet. 7 n.8; emphasis added). Since both the EEOC and the district court, in keeping with the unanimous views of the federal appellate courts at that time, "found" the seniority system to be illegal,[19] it is certainly a reasonable interpretation of the contract to conclude that petitioner was "required" within the meaning of the contract to dispense with its seniority provisions. In any event, a construction that the illegality clause excused petitioner's deviation from the contract while it was subject to an unstayed court order to do so is not "so palpably faulty that no judge * * * could ever * * * have made such a ruling." *Safeway Stores* v. *American Bakery & Confectionery Workers International Union*, 390 F.2d 79, 82 (5th Cir. 1968).

The court of appeals did not explicitly find that the illegality clause "was not susceptible [to such an] interpretation", *Kewanee Machinery Division* v. *Local Union No. 21*, *supra*, 593 F.2d at 318. Indeed, it could not have arrived at that conclusion since the interpretation is

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[19] The court of appeals' analysis of retroactivity of Title VII as it relates to the illegality clause in the collective bargaining process is clearly beyond its authority. Even if the court is correct that there was no actual illegality in light of *Teamsters*, the clause can still be read to apply to the expectations of the parties at the time of the action giving rise to the grievance. At that time the conciliation agreement was fully consistent with all lower court decisions, see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. 346 n.28; *id.* at 378-379 n.2 (Marshall, J., dissenting), and therefore the arbitrator's conclusion that reliance on the seniority provision would have been illegal is unassailable. The court of appeals in rejecting this conclusion simply substituted its judgment for that of the arbitrator, but it was the arbitrator's judgment that the parties bargained for.

plainly reasonable. Instead, the court of appeals simply undertook to ascertain for itself what the "law of the contract" (Pet. App. 11a) was. Its conclusion that the *Teamsters* and *Southbridge Plastics* opinions "declared the law as it existed in the past, controlling the actions of the parties" represents its own jurisprudential view [20] of the meaning of the "illegality" clause and thus of the employer's liability under the contract. But this is precisely what is forbidden by this Court's decisions restricting the authority of courts when reviewing decisions of an arbitrator.

Nor is the court of appeals' analysis advanced by its reliance on Arbitrator Sabella's failure explicitly to cite the illegality clause in his award or his statement that it would be "manifestly unfair and inequitable" under the circumstances to assess backpay awards against petitioner. This Court in *Enterprise Wheel, supra*, rejected the idea that lack of clarity as to the basis for an arbitral award justifies a court in rejecting it. This Court's statement is directly controlling in this case (363 U.S. at 597-598; emphasis added):

> The opinion of the arbitrator in this case * * * is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. *A mere ambiguity in the opinion accompanying an*

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[20] For example, the court of appeals stated that "the starting point [of its analysis] must be in general that the law is now but also has been in the past what the highest tribunal which considers the issue decides is the law." Pet. App. 12a. It asked itself, answering in the affirmative, "[d]oes this case fall within the usual pattern arising from the reversal of an administrative and lower court decision?" *Id.* at 13a. Thus, the court clearly analyzed the question of contract interpretation (*i.e.*, whether the employer was excused by the initial ruling of the district court) as if it had plenary authority to review the merits.

award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.

See also *Arco-Polymers, Inc.* v. *Local 8-74*, 671 F.2d 752, 755 (3d Cir. 1982). There is clearly a plausible rationale grounded in the contract for Arbitrator Sabella's award and the court of appeals consequently erred in disturbing it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Equal Employment Opportunity Commission

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Docket Sheet

NO. 81-1314-CFX	TITLE W. R. Grace and Company, Petitioner v. Local Union No. 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America

DOCKETED	COURT
Jan. 14, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Peter G. Nash
	Counsel for Respondent: Danny E. Cupit,
Dec. 14, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until January 14, 1982 by White, J. on Dec. 14, 1981.
Jan. 14, 1982	Petition for writ of certiorari filed. (Record filed).
Feb. 8, 1982	Order extending time to file a response to the petition until March 20, 1982.
Mar. 19, 1982	Brief for the respondent in opposition filed.
Mar. 24, 1982	DISTRIBUTED. 4-16.
Mar. 26, 1982	Reply brief for the petitioner filed. (D).
June 22, 1982	REDISTRIBUTED. 6-24.
June 28, 1982	Petition GRANTED.

July 30, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Sept. 3, 1982.
Aug. 18, 1982	Order further extending time to file the joint appendix and petitioner's brief on the merits until Sept. 17, 1982.
Sept. 17, 1982	Motion of The Equal Employment Advisory Council to file a brief as amicus curiae filed.
Sept. 17, 1982	Joint appendix filed.
Sept. 17, 1982	Brief for the petitioner filed.
Sept. 17, 1982	Brief for the EEOC as amicus curiae filed.
Sept. 24, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct. 4, 1982	The motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae is GRANTED.
Oct. 12, 1982	The motion of the Solicitor of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
Oct. 14, 1982	Order extending time to file the respondent's brief on the merits until Nov. 22, 1982.
Nov. 19, 1982	Order further extending time to file the respondent's brief on the merits until Nov. 24, 1982.

(OVER)

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Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 24, 1982	Brief for the respondent filed.
Dec. 14, 1982	CIRCULATED.
Feb. 18, 1983	Reply brief for the petitioner filed. (D).
Feb. 28, 1983	ARGUED.